IN THE

Supreme Court of the United States.

OCTOBER TERM, 1921

No. 14859

IN THE MATTER OF MARCUSE & COMPANY,
ALLEGED BANKRUPTS.

C. B. GILES, JOHN JANCS, I. FIEGEL, FRED MAYER, E. H. ALLEN AND GEORGE B. GIFFORD,
Petitioners,

vs.

HENRY VETTE, PETER M. ZUNCKER, THEODORE REGENSTEINER, CLEMENT STUDEBAKER, JR., GEORGE M. STUDEBAKER, FRANK A. HECHT, JR., AND CLARA K. HECHT, EXECUTORS OF THE WILL OF FRANK A. HECHT, AND JOSEPH M. FINN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT. pp. 1-2

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of C. B. Giles, John Jancs, I. Fiegel, Fred Mayer, E. H. Allen, and George B. Gifford, petitioning and intervening creditors of the firm of Marcuse

& Company, respectfully shows to this Honorable Court as follows:

In 1917 the firm of Marcuse & Co., of Chicago, was organized to conduct a general stock brokerage business. In 1919 the firm failed and a petition in involuntary bankruptcy was filed against it.

The amended petition alleged that Ben Marcuse, Lew H. Morris, Joseph M. Finn, Frank Hecht, Clement Studebaker, Jr., George M. Studebaker, Theodore Regensteiner, Henry Vette and Peter M. Zuncker, were all general partners in the firm of Marcuse & Co. and sought an adjudication in bankruptcy against them.

A dispute early arose as to who composed the firm of Marcuse & Co. On the part of the creditors it was insisted that the firm was composed of Ben Marcuse, Lew H. Morris, Vette, Zuncker, Regensteiner, Clement Studebaker, Jr., George M. Studebaker, Hecht and Finn as general partners. On the part of Finn, Hecht and the other respondents hereto it was insisted that Marcuse and Morris were general partners and the other respondents were limited or special partners only, and were not liable for the debts of the bankrupt firm beyond the money they had paid into the firm.

By stipulation the liability of the respondents as general partners was first heard by the District Court with the agreement that if all respondents were held liable as general partners, the matter should then be referred to a referee for a hearing on the issue of insolvency. (Rec., 17, 747.)

On a very full hearing and with a large mass of evidence, documentary and oral, before it, the District Court decided that they were all general partners; that the so-called special partnership, by reason of its failure to comply with essential provisions of the Illinois stat-

utes, was a general partnership, and that the Studebakers, Zuncker, Vette and Regensteiner had selected Hecht and Finn as their representatives in the operation of the special partnership. It then entered an order directing a reference to a referee to hear evidence and report as to the solvency of the firm, treating all the respondents as partners.

Vette and the other respondents, except Hecht and Finn, filed a petition in the Circuit Court of Appeals to review and revise the order so entered, on the ground that they were special or limited partners and not liable generally for the debts of the firm. Hecht and Finn were made respondents to that petition and joined in the hearing in the Court of Appeals, taking the position that none of the respondents was liable as a general partner, and further that in signing the partnership agreements hereafter referred to, they were acting as representatives of the other respondents, and that if they were general partners the other respondents were also general partners.

On the hearing of that petition the Court of Appeals was divided, two of the judges (Alschuler and Page) being of the opinion that the respondents were not liable as general partners, and uniting to reverse the decision of the district judge; while the third member of the court (Evans) wrote a dissenting opinion, concurring with the district judge and holding that all the respondents were general partners.

Up to the present time therefore two judges have held that respondents were general partners and two have held otherwise. The two writing the ruling opinion have held substantially that respondents were not general partners or that they have been relieved from liability as such because of certain provisions of the new Uniform

Limited Partnership Act, which was adopted in Illinois July 1, 1917.

Petitioners filed in the Court of Appeals a petition for rehearing. That petition was denied April 4, 1922 (1027). This petition is presented to obtain a review of the judgment of the Court of Appeals. Petition for *certiorari* is the proper method in such a case. (*Weidhorn* v. *Levy*, 253 U. S. 268.)

For convenience of the court we have attached to our petition and brief copies of the two opinions of the Court of Appeals. This accounts for the length apparent of this document. Our references will be to the printed record in this case except as otherwise indicated.

Prior to 1917 there was in Chicago a stock brokerage firm named Von Frantzius & Co. In March, 1917, that firm was in bankruptcy. Von Frantzius had died and his estate was then in the Probate Court. Bankruptcy proceedings had been brought about by his death and the consequent discovery of his firm's insolvency. Marcuse had been a partner in Von Frantzius & Co. and Morris an employee. All the other respondents hereto had been customers of the firm of Von Frantzius & Co. and most of them were creditors in large amounts. Vette and Zuncker had come out about even.

They all determined, at the solicitation of Marcuse, to form a new partnership to succeed to the Von Frantzius brokerage business and seek to recover what they had lost through that firm.

It was arranged that the new firm should be a limited partnership under the Illinois act of 1874 with Marcuse and Morris as general partners and all the respondents hereto as special or limited partners. It was also agreed that 25 per cent of the earnings of the new firm should be devoted to making good to respondents their losses through the Von Frantzius firm.

There had been negotiations for the formation of the new partnership before February 2, 1917, and under that date the provisions concerning the recovery by these special partners (except Vette and Zuncker) of their losses were elaborated. The written plan included the issuing by Marcuse of certificates to each of the partners certifying the amount of the indebtedness of the Von Frantzius firm to the holder, provided that Marcuse should acquire the Von Frantzius estate at judicial sale, form such a partnership as was afterwards formed, and from the proceeds of the Von Frantzius estate and 25 per cent of the earnings of the new firm should pay the special partners what was owing them from the Von Frantzius firm. The form of these trust certificates issued by Marcuse appears at page 669 as petitioner's exhibit 26 and is dated February 2, 1917.

What was done in forming the partnership, the purpose of the parties, the object of the partnership, and nearly all other matters required for consideration and determination of this case are largely shown in three documents that appear in the record. These three documents are:

1. A partnership agreement dated April 2, 1917, and signed about that time, for a limited partnership to carry on a brokerage business, the firm to be composed of Marcuse and Morris as general partners and *all* the respondents hereto as special partners.

2. An agreement for a like limited partnership dated April 2, 1917, but signed June 30, 1917, with Marcuse and Morris as general partners and Hecht and Finn as special or limited partners. This agreement, although dated April 2nd, is usually referred to as the partnership agreement of June 30, 1917, as it was signed on that date.

3. An agreement dated June 30, 1917, and on that date signed by Hecht and Finn and approved by Marcuse and Morris, providing that Hecht and Finn, as special partners under the partnership articles signed June 30th, should represent all the respondents including themselves, and that the special capital should be contributed by all the respondents as originally determined. This document is generally referred to as the Hecht-Finn trust agreement.

These three documents are printed many times in the record, but for the purpose of this petition we will refer to the first document as it appears on page 413, to the second as it appears on page 26, and to the third as it appears on page 33 of the printed record.

Around and upon these three documents hangs all the other evidence in the record, showing the circumstances under which those documents were signed, the reasons leading to certain changes therein, the differences between, and the contemporaneous construction put upon the documents by the parties for the two years during which the partnership continued. In a proceeding of this nature all facts on which there is any evidence must be resolved in favor of supporting the District Court's decision.

Original Partnership Agreement.

The gist of the first partnership agreement is given in the statement of facts by the Court of Appeals as follows:

> "The record discloses that under date of April 2, 1917, all the alleged partners except the Studebakers (one Hoffman signing in his own name, but in fact as representing the Studebaker interest), executed an agreement which provided for carrying on at Chicago a brokerage business of buying and

selling on commission stocks, bonds, grains, etc., for a period of five years from such date, under firm name of Marcuse & Co.; that such firm be a limited partnership under the statute of Illinois, Marcuse and Morris the general partners, and the others special partners; the contributions of the latter to be, Hecht $25,000, Hoffman $50,000, Vette $30,000, Zuncker $25,000, Finn $31,500 and Regensteiner $28,500, total $190,000; that the business be conducted and managed by Marcuse and Morris, they to receive named salaries, and that on the contributions of Marcuse, Morris and of the special partners should be paid interest at 6 per cent per annum; that thereafter 25 per cent of the net profits be paid to Marcuse to be applied by him on certain certificates which he would issue representing debts due from Von Frantzius & Co. (then in bankruptcy), all of such limited partners, except Vette and Zuncker, being large creditors of the Von Frantzius concern; and that after such certificates are paid, the said 25 per cent should be paid to all the parties to the agreement except Morris; that 10 per cent of the net profits of the business was payable to Morris, *and the balance of profits was to be divided periodically between the parties in proportion to their contributions to the whole capital;* that the special partners be limited in their liability to the amounts respectively contributed to the capital, and that they should have no liability for debts of the partnership beyond such contributions; that Marcuse and Morris should be in charge of and carry on the business, and that the special partners shall have right to examine the books and have them audited, and in certain contingencies to have the business liquidated. After execution of the agreements they were left with one of the lawyers pending carrying out of certain conditions, mainly the dismissal of the Von Frantzius bankruptcy proceedings, with which concern Marcuse had been in some way connected.

One of the contributions of Marcuse toward the firm's capital was a seat on the New York Stock Exchange estimated to be then worth $68,000."

Shortly thereafter a serious obstacle arose. A membership on the New York Stock Exchange was absolutely necessary to the carrying on of the business, but when Marcuse went to New York to have his firm admitted to the exchange, he discovered that the rules of that exchange provide, first, that in any brokerage firm with a membership on that exchange there could only be two special partners, and, second, that no person engaged in any other business could be a partner in such a firm. The firm had not commenced to do business, as the assets of the old Von Frantzius firm had not been acquired, and probably would not be until about July 1st.

No thought of abandoning the plan for a partnership occurred to any of the parties who had signed the first agreement. They determined to circumvent or avoid the rules of the New York Stock Exchange. It was found that Hecht and Finn had retired from business and were therefore qualified as members of a brokerage firm. The other special partners were engaged in other businesses. It was determined that the partnership should proceed just as originally planned, with, however, Hecht and Finn appearing as special partners *representing* all the respondents. No other change whatsoever was to be made in the arrangements.

The Studebakers' counsel testified that the intention was to withdraw them entirely from the partnership, but this testimony is not consistent with that of Marcuse, Finn, Regensteiner, Hoffman and Zuncker. (Rec., 552-57, 617-21, 399, 400, 641-51, 696.) The District Court found the change of program was to avoid the New York Exchange rules. (Rec., 933.)

It is conceded in both the controlling and dissenting opinion of the Court of Appeals that upon such petition to review and revise only questions of law can be

considered, and that every fact necessary to support the District Court's order which is supported by any evidence must be assumed as existing. Counsel on both sides of the case concurred in this proposition.

Revised Partnership Agreement.

This brings us to the second vital document in this case. It is the revised partnership agreement (Rec., 26), still dated April 2nd but actually signed June 30th, under which the partnership was finally formed and under which it continued for about two years, when it failed and was put into bankruptcy. As if to preserve the continuity of the transaction and to show that it is but a paraphrase of the former partnership agreement, it bears the same date, April 2, 1917.

Of this second document the Court of Appeals in its statement of facts said:

> "The stated objects of the partnership, the name and the details respecting rights, duties and immunities of the parties, and the character and amount of capital contributions were in all essential features the same as under the first contract, except that Hecht and Finn, the special partners, each agreed to contribute $95,000, and the term was five years from July 1, 1917."

The agreement was signed by Marcuse, Morris, Hecht and Finn. The total amount of capital contributed by all the respondents under the first agreement was $190,000. The amount of capital contributed by Hecht and Finn under the new agreement was $190,000. The contribution under the second agreement was actually by all seven of the respondents, each contributing the same amount that he agreed to contribute under the first agreement. The provisions for a limited liability are the same. The provision that 25 per cent of the net profits should go to Marcuse to pay the creditors of

Von Frantzius is the same. The provision for Morris and that all other net profits shall be divided among all the others is exactly the same. The provisions concerning the keeping of books, access thereto, general statements, trial balances, *sharing in losses*, the amount of special capital, the appointment of auditors and the authority of the seven respondents to wind up the business, are all the same as in the former agreement.

Necessarily there were some differences or the second contract would still be obnoxious to the New York Exchange. Necessarily this second document omitted on its face some rights of respondents other than Hecht and Finn. Although the latter two actually contributed only about one-third of the special capital, they could, under the second agreement, draw the dividends due all the special partners. The respondents other than Hecht and Finn although contributing two-thirds of the special funds, were without power to appoint an auditor, without power to order a dissolution.

Thereupon the third principal document was drawn on the same day and is sometimes referred to in the record as the Hecht-Finn trust. It appears at page 33 of the record.

The Hecht and Finn Agreement.

This instrument was executed June 30th, at the same time as the second partnership agreement and as part thereof, and has attached to it as an exhibit a copy of the partnership agreement of June 30th. It is sometimes called the Hecht and Finn trust, though in reality no trust at all.

This third agreement recites that Hecht and Finn are entitled, as special partners under the second partnership articles, to 6 per cent on the special capital con-

tributed by them and also to their share of the profits; that the other five respondents are entitled to a like distribution of interest and profits on the capital they furnished; calls Hecht and Finn trustees, and provides that the entire distributions and dividends payable to all the respondents, including Hecht and Finn, shall be paid by the firm to the Chicago Title & Trust Company, which shall thereupon distribute such receipts in accordance with the interests of the seven respondents in the partnership. It restores to the respondents (other than Hecht and Finn) their access to the books of account showing, among other things, all losses sustained, liabilities incurred and all payments by and receipts of general partners.

It further provides that auditors shall be appointed, not by Hecht and Finn, but by a majority of the holdings of the seven special partners. It restores to the control of the majority of them the right to dissolve the firm if the auditors' report is unfavorable, provides that Hecht and Finn shall act as directed by the wishes of a majority of the respondents, and if they do not do so, the holders of the majority of them can apply for a dissolution of the partnership, and in the event of the death of both trustees the majority of the remainder of the special partners shall appoint a new trustee.

THE ATTEMPT TO FORM A LIMITED PARTNERSHIP FAILED.

All proceedings for the formation of the limited partnership in question were taken under the Illinois partnership law of 1874, which permitted the formation of a limited partnership to carry on a brokerage business if certain required steps were taken, particularly the making and acknowledging of a statement by all the partners showing the names of all special partners or persons interested in the firm, the amount of contribution by each special partner and that all such contributions were actually paid in, and the filing of such certificate in the office of the county clerk of the county in which was the principal place of business of the proposed firm.

Section 8 of the Limited Partnership Act of 1874 provides:

> "SECTION 8. No such partnership shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed as above directed; and if any false statement shall be made in such certificate or affidavit, *all* the persons interested in such partnership shall be liable for all the engagements thereof, *as general partners.*"

In 1917 Illinois adopted the Uniform Partnership Act and the Uniform Limited Partnership Act, changing materially the partnership law of Illinois. The new acts took effect on July 1, 1917, the old act expiring with June 30th.

The certificate referred to above, required by the Act of 1874, was not recorded until July 2nd when the act under which it was recorded had been repealed. No attempt was ever made to comply with the new limited partnership act and it was conceded by counsel for respondents, and it is stated in the ruling opinion of the Court of Appeals that this partnership was not com-

pletely formed as a limited partnership under the act either of 1874 or 1917.

For convenience we print as a footnote, the sections of the new Illinois Uniform Limited Partnership Act, particularly involved in this case, and also Sections 6 and 7 of the new Uniform General Partnership Act.

As there is no serious contention in the record that a limited partnership was formed either under the Act of 1874 or under the Uniform Limited Partnership Act of Illinois, and as no attempt was made to conform in any way to the new act and because it expressly provides that no brokerage business can be carried on under

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SECTIONS FROM THE ILLINOIS UNIFORM LIMITED PARTNERSHIP ACT.

"Section 1. *Be it enacted by the people of the State of Illinois, represented in the General Assembly:* A limited partnership is a partnership formed by two or more persons under the provisions of Section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership."

"Section 2. (1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated,

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to con-

it, the defense is largely a confession and avoidance based on two theories:

First, that respondents are freed from partnership liability by Section 11 of the new limited act, which provides that where partners thereunder "erroneously be-

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tributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution,

(b) File for record the certificate in the office of the recorder of deeds of the county where the principal office of such limited partnership is located.

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph 1."

"Section 3. A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking, insurance, brokerage and the operation of railroads."

"Section 11. A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

"Section 28. (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Act.

(2) This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This Act shall not be so construed as to impair the obligations of any contract existing when the Act goes into effect, nor to affect any action or proceedings begun or right accrued under this Act takes effect."

"Section 30. (1) A limited partnership formed under any statute of this State prior to the adoption of this Act, may become a limited partnership under this Act by complying with the provisions of Section 2; *provided* the certificate sets forth:

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this State prior to the adoption of this Act, until or unless it becomes a limited partnership under this Act, shall continue to be governed by the pro-

lieve'' that they are members of a limited partnership, and upon learning they are not limited partners, promptly renounce their interest in the profits of the business, they shall not be held liable as general partners; and,

Second, that as respondents did not become limited

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visions of an Act entitled, 'An Act to revise the law in relation to limited partnerships,' approved March 18, 1874, in force July 1, 1874, except that such partnerships shall not be renewed unless so provided in the original agreement."

"Section 31. Except as affecting existing limited partnerships to the extent set forth in Section 30, the Act entitled, 'An act to revise the law in relation to limited partnerships,' approved March 18, 1874, in force July 1, 1874, is hereby repealed."

SECTIONS 6 AND 7 OF THE ILLINOIS UNIFORM GENERAL PARTNERSHIP ACT.

"Section 6. (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this act, unless such association would have been a partnership in this State prior to the adoption of this Act; but this Act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith."

"Section 7. In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by Section 16, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(a) As a debt by installments or otherwise;

(b) As wages of an employee or rent to a landlord;

(c) As an annuity to a widow or representative of a deceased partner;

(d) As interest on a loan, though the amount of payment vary with the profits of the business;

(e) As the consideration for the sale of the good will of a business or other property by installments or otherwise."

partners under the old act and did not become limited partners under the new limited act, and did not intend to be general partners, therefore they were not partners at all and cannot be held liable as such.

Effect of Section 11 of New Limited Act.

In connection with the first defense the evidence showed that the partnership continued active nearly two years, then became insolvent and was thrown into bankruptcy; that shortly thereafter Hecht and Finn tendered or paid to the receiver $46,000, claiming that to be all the profits or dividends that had been distributed to all seven of respondents and claimed the protection of Section 11. It was also shown (Rec., 896-99) that the other five respondents declined to participate in the tender, disclaimed any necessity of returning profits and refused to allow Hecht and Finn to tender the return of the profits or to make a renunciation of interest in their name or on their behalf. They claimed they were not special partners. This is also stated in both opinions of the court.

The creditors insisted that the limited partnership was sought to be created under the old law; that nothing was ever done under the new law; that a limited partnership for brokerage could not act under the new law; that Section 11 of the new act did not apply to a partnership formed under the old act and especially not to a brokerage business, as that act excluded that business, and that in any event Section 30 of the Uniform Limited Partnership Act expressly provided that until any limited partnership under the former act complied with provisions of the new act, it should be governed entirely by the provisions of the old act. The creditors also insisted that "erroneously believe" could not apply

to a mistake in law and especially total disregard or continued ignorance for over two years of such well known statutes as the Uniform Partnership Acts, and that in any event the respondents other than Hecht and Finn had not tendered or made restitution of profits received, had not renounced their interest in the partnership and could not take advantage of Section 11. The district judge and one of the circuit judges decided with the creditors, but the other two circuit judges, writing the controlling opinion, held the position taken by respondents sound and that no recovery against them could be had.

Effect of Sections 6 and 7 of New General Partnership Act.

On the second point respondents urged that they were not partners at all, not having formed a limited partnership under either the old or the new act and not having intended to be general partners. They relied upon the provision of the new act that it must be liberally construed to avoid liability, insisted they did not come within the definition of "an association of two or more persons to carry on a business for profit," and laid particular stress upon the clause in Section 7 of the new Uniform General Partnership Act that persons who are not partners as to each other are not partners as to third persons. They insisted that intention to be partners was an absolute prerequisite of their being partners, and that if they did not intend to be partners, they were not partners to each other and therefore could not be partners as to the general public, whatever their acts may have been.

The creditors insisted that there was a partnership, that a partnership business had been carried on, that

they had dealt with a partnership and they showed its members and its business. They insisted that all that was ever done to form this partnership was done on or before June 30th, and therefore it was a partnership under the old general partnership law, and that even if that was not so, it was a full-fledged general partnership under the new law. They relied upon the recitals in both partnership agreements that the paper was designed to create a partnership and because they desired to become partners with each other, and also upon the adoption of that theory in the third document, the so-called Hecht-Finn trust.

The judges divided in the same way on this question and the controlling opinion was therefore that no partnership had ever been formed and that none of the respondents were liable as partners.

The Importance of a National Construction of the Uniform Partnership Acts.

The American Bar Association has a standing committee on uniform legislation. That committee for many years has been engaged in an attempt to procure the passage of uniform statutes on subjects of general commercial importance and has procured in Illinois and elsewhere the passage of many uniform acts.

In line with its general campaign on this subject it procured in various states the passage of statutes providing for a "Commission for Uniformity of Legislation in the United States." Pursuant thereto Illinois in 1907 passed an act creating a "Commission on Uniform State Laws." Commissioners were appointed under that act to represent Illinois. These commissioners met from time to time with similar commissioners representing all states of the union composing the "National Conference of Commissioners on Uniform State Laws."

At the 1916 meeting there was reported to the National Conference by a "Sub-committee on Commercial Law" the text of the "Uniform Limited Partnership Act." This act was approved by the national commissioners, submitted to the various states, passed by the Illinois legislature in 1917, becoming effective July 1st of that year.

The various uniform acts drafted under the guidance of the National Conference of Commissioners have from time to time been adopted by various states of the union, some of them, such as the Uniform Negotiable Instruments Act, having been adopted by practically every state. Others have been adopted by a lesser number.

The work of the National Commission on uniform laws is of the utmost importance in the present development of jurisprudence in the United States. The declared purpose of the American Bar Association when it was founded in 1878 was stated as follows:

> "Its object shall be to advance the science of jurisprudence, promote the administration of justice and *uniformity of legislation and of judicial decisions throughout the nation.*"

Frank J. Stimson, in the American Academy of Political and Social Science of 1895, speaking of the work of the National Conference of Commissioners on Uniform State Laws, said that the movement, if successful to any degree, "would be the most important juristic work undertaken in the United States since the adoption of the federal constitution."

These statutes, if they are to serve the purpose for which they are drafted, must be adopted by the various states practically verbatim as recommended by the Commission. They must be interpreted rationally and uniformly and by reason of their general application, they have become practically federal statutes. It is as im-

portant that such acts be construed with uniformity as that they should be passed in the first instance.

Any construction of the uniform statutes that would thwart the purpose of the drafters, any forced construction to meet a particular case, especially by a divided court, would only bring about divergence in construction and will do great harm and mean that the uniform laws will not be uniform in the different jurisdictions.

The holdings of the court in this case are:

1. That section 11 of the Uniform Limited Partnership Act applies to partnerships formed under the prior act, as well as under the new act, and in fact, to partnerships that cannot be formed under the new act.

2. That section 7 of the Uniform *General* Partnership Act can be applied to firms attempted to be formed as *limited* partnerships, but failing completely in that attempt, and then be so construed as to relieve the members from all liability, as either general or special partners.

3. That a brokerage house in Chicago formed as a partnership can do business for two or three years, invite deposits, squander funds, not make the investments for which the funds were remitted, fail for a large amount, and still, under the two acts, be held to be no partnership at all, and that some at least of the partners go scot-free.

We insist that these holdings are a palpable misconstruction of the uniform partnership statutes, that they are far-reaching in their effect, are contrary to the policy of Illinois as shown in cases cited in our accompanying brief, and will defeat the uniformity for the sake of which these acts were passed.

Where a question is decided by a divided court, as the present one was, where it is the first decision upon the interlocking of these different statutes, where it is the

first decision to hold that under such circumstances certain of the parties who were reaping the benefits were not partners at all, there ought to be a more authoritative construction of the statute.

The Uniform Partnership Acts are among the most recent of the uniform acts approved by the Commission and recommended for passage. Up to the present time they have been adopted by about fourteen states. The construction placed on these acts by the majority opinion brings about such remarkable results that if that construction is to stand, the Uniform Law Commissioners will undoubtedly wish to change the text of the acts before passage by other states. At once we have divergence, not uniformity.

We submit also in favor of this petition for *certiorari* that the decision of the Court of Appeals is plainly and manifestly wrong, so much so, that we are entitled to have it reviewed.

The amount involved in this case should also be taken into account and the very large number of creditors, many of whom doubtless sent in their earnings to have them invested in bonds and now have nothing in return for such deposits. The business was akin to banking. The capital put into the business was $190,000 from the special partners, $10,000 from Morris, $60,000 from Marcuse, a New York Stock Exchange membership worth $68,000 and a Chicago Stock Exchange membership worth $2,000, or a total of $330,000. In three months, on September 30, 1917, it reached a business involving $4,272,830.04, including a loss for the three months of $324,655.34. (Rec., 713.) The firm's capital was then gone and it was conducting business on its depositors' moneys, and the firm so continued in business for about two years, until failure.

While no report of the receiver in bankruptcy appears

to show whether there will probably be a dividend, yet it appears from page 971 of the record that the books show about 700 creditors and page 973 shows that liabilities exceed assets by $1,729,640.73. This indicates a continuous loss at about the rate of the first three months. Assets usually shrink and liabilities increase, and there is probably a deficit considerably in excess of $2,000,000. From pages 965 to 970, it appears from their own statements that Vette, Zuncker, Regensteiner and the Studebakers are worth much in excess of $3,000,000, and the resources of Hecht and Finn are not shown.

Is it any wonder that the Illinois Uniform Limited Partnership Act refuses to permit a brokerage business to be carried on by a limited partnership and that the Illinois corporation act refuses to permit a corporation to be formed to carry on such a business, and thus requires unlimited personal liability on the part of those engaging in such business?

The reasons we have for applying for this writ of *certiorari* are:

a. The public interest in having an authoritative ruling on these most important uniform acts—a ruling that will inspire confidence and preserve the uniformity aimed at.

b. The fact that these questions—so important to the public as well as to the litigants here involved—are decided practically by two judges on each side of the questions.

c. The palpable error involved in the construction given by the Court of Appeals to the uniform statutes involved.

d. The large amount involved and the great hardship that the present ruling imposes on over 700 creditors.

For these reasons we respectfully ask that a writ of *certiorari* be granted to bring up for review the questions involved.

And your petitioners will ever pray.

C. B. GILES,
JOHN JANCS,
I. FIEGEL,
FRED MAYER,
E. H. ALLEN,
GEORGE B. GIFFORD,
HAROLD LACHMAN,
By WILLIAM BURRY,
JULIUS MOSES,
GUY M. PETERS,
LEWIS F. JACOBSON,
JACOB RINGER,
Their Attorneys.

WILLIAM BURRY,
JULIUS MOSES,
GUY M. PETERS,
Counsel for Petitioners.

STATE OF ILLINOIS, }
COUNTY OF COOK. } ss.

E. H. Allen, being first duly sworn, says, that he has read the foregoing petition and that the same is true to the best of his knowledge, information and belief. This application is made in good faith, not for the purpose of delay.

E. H. ALLEN.

Subscribed and sworn to before me this 12 day of June, 1922.

NATHAN M. BYKOFF,
(NOTARIAL SEAL) *Notary Public.*

CERTIFICATE.

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this court.

WILLIAM BURRY.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

The opinion of the Court of Appeals and the dissenting opinion present fully the issues in this case, and they are printed as an appendix to this brief. There are, however, some points involved not fully considered in the opinions, and some additional authorities to which we wish to call attention.

It is the position of petitioning creditors that:

1. No special or limited partnership was formed, because:

   (a) The Act of 1874, under which it was attempted to form the limited partnership and the only act under which a limited partnership to conduct a brokerage business could be formed, was repealed prior to the filing of the necessary certificate.

   (b) There were intentional false statements of material matters made in the certificate which was filed.

2. The respondents were not relieved from liability as general partners by Section 11 of the Limited Partnership Act, as that section does not apply to limited partnerships formed under the Act of 1874 until they qualify under the new act, and especially does not apply to limited partnerships formed for a purpose expressly prohibited by the Uniform Limited Partnership Act. Moreover, respondents did not comply with the proviso of Section 11.

3. On the failure to form a limited partnership the respondents all became general partners both at common law and under the Uniform Partnership Act.

4. The respondents who for two years owned and operated this brokerage business in Chicago, a business that was insolvent within three months after its doors were opened and finally ended in the bankruptcy court, should not be allowed to go free but should be held liable for its debts.

I.

NO SPECIAL OR LIMITED PARTNERSHIP WAS FORMED.

(a) The Act of 1874 was repealed prior to the filing of the necessary certificate.

The District Court found, and both opinions of the Court of Appeals proceed on the assumption that the effort to form a limited partnership failed. No other result could have been reached. An attempt was made to form the limited partnership under the Act of 1874. The statutory certificate which was signed and filed, recited (Rec., 361):

> "This is to certify that the undersigned, Ben Marcuse, L. H. Morris, Frank A. Hecht and Joseph M. Finn, being desirous of forming a limited partnership *under provisions* of an Act of the General Assembly of State of Illinois entitled, 'An Act to Revise the Law in Relation to Limited Partnerships,' approved March 18, 1874, in force July 1, 1874, do hereby certify," etc.

This certificate was filed July 2, 1917, and only purported to give the limited data required by the Act of 1874, not the much fuller disclosure required by the tho Act of 1917. The certificate was filed in the office of the county clerk as required by the Act of 1874, not recorded in the office of the county recorder as required by the Act of 1917.

On June 30, 1917, the Act of 1874 was repealed, except as to limited partnerships then in existence. This lim-

ited partnership had not been completed prior to that repeal.

Section 8 of the Act of 1874 is as follows:

> "Section 8. No such partnership shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed, as above directed; and if any false statement shall be made in such certificate or affidavit, *all the persons interested in such partnership shall be liable* for all the engagements thereof, *as general partners.*"

This certificate, acknowledgment and affidavit was not filed until July 2nd. The final and vital element, therefore, in forming a limited partnership under the Act of 1874 did not take place until that act had been repealed.

(b) Had the certificate been filed in time under the Act of 1874, respondents would still have been liable as general partners because of the false statements in the certificate and the failure of some of the limited partners to sign that certificate.

The Act of 1874 provides (Sec. 4):

> "The persons desirous of forming such partnership shall make and *severally* sign a certificate which shall contain 1, * * *; 2 * * *; 3. *the names of the general and special partners* therein, distinguishing which are general and which are special partners, and their respective places of residence; 4. The amount of capital stock which *each special partner* shall have contributed to the common stock."

The essential feature of this certificate, designed for the information and protection of creditors, is that *the names* of the special partners shall be disclosed, the amount of the *contribution of each special partner be disclosed* and that this certificate shall be signed and acknowledged *by each* of the special partners. To avoid

the rule of the New York Stock Exchange, but with the effect of concealing this essential information from creditors, the certificate filed did not disclose the contributions to the partnership fund made by Vette, Zuncker, Regensteiner and the Studebakers or their connection with the organization. It was not signed by them.

As pointed out in our petition, these men were all partners and every right secured to all the special partners under the first partnership agreement was preserved to them under the second and third agreements. They made the same contributions to the capital, were entitled to the same proportion of the profits, bore the same proportion of losses, and had the same right to inspect the books, appoint auditors and dissolve the partnership as was given them in the first document.

While, in the third document, Hecht and Finn are called trustees, they were not trustees in any sense. There was no *corpus* to the trust, and no property, not even the dividends, passed through their hands. They had no control over the business that could not equally be exercised by their associate certificate holders. That trust document would never have been written had it not been that the other respondents had no trust or faith in Hecht and Finn.

The effect of the so-called Hecht-Finn trust was to deliberately put all the respondents, including Hecht and Finn, upon exactly the same basis with reference to the partnership. If any one of them is a general partner, all of them are. The so-called Hecht-Finn trust, simply emphasizes the fact that the firm which finally engaged in business was the firm arranged for in February, sought to be formed in April and that was finally formed in June.

The contemporaneous construction put upon the docu-

ments by the parties shows that they considered the substituted documents but a carrying-out of the first partnership contract. Marcuse testified that it was a continuation of the same scheme, some of the respondents testified that it was not, and the District Court found that the articles of June 30th were the result or continuance of the articles of April 2nd. In this proceeding to review and revise no disputed question of fact can be inquired into.

No money was paid by any resondent to Hecht and Finn. On Saturday morning, June 30th, the contributors in person or by their counsel met in the office of Marcuse & Co. and handed in checks for the amount of their respective contributions. (Rec., 505, *et seq.*) They each laid their checks on the table. The checks of Hecht and Finn were for their contributions as provided by the first partnership agreement. The checks of the other contributors were for the amount of their contributions according to the first agreement. The latter checks were drawn to the order of Hecht and Finn but were at once endorsed by them and laid with the other checks on the table.

Zuncker concedes (Rec., 557) that he paid $25,000 into the Hecht-Finn trust and supposed it went to Marcuse & Company. Marcuse testified that he talked with the two Studebakers and that they told him that they would put $50,000 into the enterprise and referred him to Mr. Scott Brown or Mr. Hoffman for details. On the 30th of June Hoffman was present with the $50,000 check. Mr. Robertson was present as the representative of Vette and Zuncker and said that he would not have delivered their $55,000 into the fund unless all of the $190,000 went in at the same time. (Rec., 857.)

The money passed directly from respondents to the partnership account.

Therefore, on June 30th, each of the respondents, present in person or by attorney at the meeting when the certificate was made, knew that that certificate was purposely made false in two most important particulars—the names of the special partners and the amounts contributed by them; and it was not *"severally"* signed by each of the special partners.

On December 1, 1918, Marcuse & Co. declared an extra or special dividend of 4 per cent. Checks for this dividend were mailed by Marcuse & Co. direct to all the special partners or credited to their trading accounts and so accepted by them, with the exception of the Studebakers, who returned their checks, requesting that they be made payable to the Chicago Title & Trust Co., which was done. (Rec., 728.)

The District Court found and the Court of Appeals opinions proceed on the assumption that the purpose of making the change in the form of the original partnership agreement was to avoid the rule of the New York Stock Exchange. Section 8 of the 1874 Act provides:

> "and if any false statement shall be made in such certificate or affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof as general partners."

This is an Illinois statute and the Illinois courts have construed it that failure to give correct information required by the act renders all parties liable *as general partners.*

In *Cummings* v. *Hayes,* 100 Ill. App. 347, the court held all the members of an attempted limited partnership liable as general partners because one of them had signed the statutory certificate by an attorney, and said (p. 354):

> "What portions of the statutes are designed for the protection of those who may deal with the firm?

Manifestly, the statements of capital contributed by the special partners, the duration of the partnership, *the names of the parties, and certainty as their assent thereto.*"

"The certificate filed in the office of the clerk of the county, to be by him recorded in a book and kept subject to inspection by all persons, *must be such that therefrom, and without outside inquiry or examination, it can be determined with certainty whom the parties forming which limited partnership are, and that each of them has joined therein and assented thereto.*"

Buckley v. *Bramhall*, 24 How. Prac. 456, is a well-considered case directly in point. Bramhall had contributed $80,000 special capital, but the certificate did not disclose his interest. The court said (p. 459):

"He sought to secure the right and all the benefit of a special partner without becoming one, and thereby *made himself a general partner.* He is made so by the operation of the statute, which declares that all persons interested in the partnership shall be liable as general partners if any false statement is made in the certificate or affidavit by which the limited copartnership is formed."

Respondents, therefore, by their own deliberate act, rendered themselves liable as general partners.

Nothing more was ever done by the firm by way of issuing certificates, verifying them, or filing them anywhere. No attempt was made to qualify under either the limited or general uniform partnership act taking effect July 1, 1917. Therefore this partnership, whatever it was, stands on the Act of 1874 and was a general partnership under that act.

If the above situation was in any way affected by the new legislation, it could only make the firm a general partnership under the new act, for a brokerage firm could not be formed or perfected under the new limited partnership act. Indeed one of the claims made for respond-

ents was that they did not know anything about the new law. In Judge Alschuler's opinion it is stated that no attempt was made to qualify under the new law, and the court excuses the respondents from doing so, where it says that the new law had just been passed and had not been published and there was not opportunity for public discussion thereon, and that after the firm was once organized there was no occasion for investigation of the law or for ascertaining anything about the law during the two years that the firm remained in operation with the new acts in force. But we know that the passage of the uniform acts was a matter of much discussion for several years before they were passed.

There is little dispute up to the present point between us and the ruling opinion of the Court of Appeals, for as before said, that opinion simply sustains a defense of confession and avoidance.

II.

SECTION 11 OF THE LIMITED PARTNERSHIP ACT OF 1917 HAS NO APPLICATION.

The principal part of the controlling opinion of the Court of Appeals is based on Section 11 of the Uniform Limited Partnership Act. That section is above set out in full in our footnote (pp. 13, 14 and 15). This contention involves a most important construction of the Uniform Limited Partnership Act.

In construing statutes the intention of the enacting body is sought. In the uniform acts approved and recommended by the Commission on Uniform Laws, we should perhaps go back of the enacting body and seek the intention of that Commission.

Section 11 is new. It does not occur in any prior limited partnership act. Was it the intention that this section should apply to limited partnerships then in existence, formed under prior statutes? Was it intended to apply to limited partnerships formed under prior acts to construct a business expressly prohibited by the new limited act?

Acts submitted by the Commission on Uniform Laws are drafted with unusual care by expert draftsmen, submitted to the scrutiny of the commissioners and published widely for suggestions and criticism before submission to the various legislatures.

To avoid possible ambiguities, terms in each of these acts which might be susceptible of more than one interpretation are defined. As submitted by the Commission on Uniform Laws, the heading of the first section of the Uniform Limited Partnership Act is: "Limited Partnership Defined." (See Terry, Uniform State Laws, Anno., p. 536.) That section then continues:

> "A limited partnership is a partnership formed by two or more persons under the provisions of Section 2."

Section 2 referred to is section 2 of that act. When "limited partnership" is subsequently used it is used without qualification in the sense defined by the act.

In the light of this definition, we turn to Section 11. The first part of it is:

> "A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership is not," etc.

What is meant here by "limited partenrship"? Obviously a limited partnership *as previously defined,* that is, a limited partnership formed under Section 2 of that

act. To hold otherwise is to ignore the definition of "limited partnerships," in the act itself.

As if to prevent any possible misconception, the new act further expressly covers the situation. Section 30 of it is entitled:

"Provisions for *existing limited* partnership."

Paragraph 2 of Section 30 is:

> "A limited partnership formed under any statute of this state prior to the adoption of this act until or unless it becomes a limited partnership under this act, *shall continue to be governed by the provisions of an act entitled* 'An Act to Revise the Law in Relation to Limited Partnerships,' approved March 18, 1874."

In other words, the new act has certain burdens that the old act did not have, for instance, much fuller disclosures. It has certain benefits the old act did not give, for instance, Section 11. Until any limited partnership formed under the old act assumes the burdens of the new act, *it continues to be governed by the provisions of the old act.* Could anything be clearer?

The construction placed upon Section 11 by the Court of Appeals wholly disregards or annuls Section 30, and holds Section 11 to be no different in effect "than if it had been adopted as an amendment to the old" (act) (Ct. App. Op.), and that partnerships formed under the old act, *not* bringing themselves under or assuming the burdens of the new act, can nevertheless have all the benefits of the new act. This construction is squarely opposed to the intention of the commissioners submitting and the legislatures enacting the Uniform Limited Act. If it stands it bids fair to work confusion. Instead of a carefully drafted substitute act, the Uniform Act will be but an amendment to prior acts, and the rights and liabilities of partners in limited partnerships formed

under prior acts must be determined by construing the former acts as if amended by the Uniform Act.

It is also clear that the liegislature did not intend, by Section 11, to grant immunity to persons forming a limited partnership under the Act of 1874 *for a purpose for which a limited partnership could not have been formed* under the Act of 1917. Section 3 of that act is:

> "A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking, insurance, *brokerage* and the operation of railroads."

By expressly denying the right to organize as limited partners for brokerage purposes, the legislature impliedly required parties engaging in such a business to do so as general partners with unlimited liability.

Yet the controlling opinion of the Court of Appeals applies Section 11 to a partnership *attempted* to be formed under the Act of 1874 to conduct a brokerage business, and gives to respondents, who for nearly two years from July 2, 1917, carried on a brokerage business in Chicago, finally ending in bankruptcy, all the immunities of limited partners.

In the court below it was contended that the new act introduced into the law a new conception of limited partnerships; that limited partnerships formed under this act must be treated in a new manner, and that we now have a new creature of the law—limited partnerships—to which a new public policy is to apply. It probably was for that very reason that Illinois expressly excluded from such more liberal policy any partnership formed to conduct a brokerage business.

To apply Section 11 to limited partnerships organized under the 1874 act, is to force into the new act a meaning the legislature expressly denied to it. It is extending the provisions of a lenient act to a business which

could not be carried on under that act. It is evading the very purpose of the legislature in excluding brokerage houses from that act.

There is reason in the determination of Illinois refusing to allow a brokerage business to be carried on under the Uniform *Limited* Partnership Act. Every argument that the new limited partnership act created a new era in partnerships but emphasizes the purpose and intention of the legislature that brokerage firms must not operate under that act, and the stronger such arguments are, the more certain it becomes that that act cannot be availed of to carry on a brokerage business.

Banking, insurance and brokerage have always been considered by the legislature of Illinois (and by legislatures generally) as differing from other business. There is good ground for such treatment. The trust the public necessarily places in banking, insurance and brokerage houses, the vast amounts of other peoples' money they handle, the duties they owe to protect and conserve that money, all that we know about such business, justifies the law-making authority in refusing to allow such business to be carried on by a partnership with limited liability; and also justifies the Illinois Legislature in refusing to allow banking or insurance business to be carried on by a corporation organized under the general incorporation act, in requiring double stockholders' liability in banking, and in refusing to allow a brokerage house to be incorporated at all.

Therefore no person is now allowed to engage in brokerage business as a limited partner or as a stockholder. He must do so under the general partnership act, and place at the risk of that business his entire fortune.

The large number of failures of brokerage houses during this year suggests the wisdom of this policy.

If a partnership had been formed after July 1st for the purpose of banking and an attempt had been made so to form it under this new limited partnership act, would anyone for an instant have thought that the firm so carrying on the banking business was a limited partnership and not a general partnership? Would ignorance of the new law have supported a defense founded on "erroneous belief"? The very highest financial responsibility is requisite for protection of people doing business with banking, brokerage and insurance institutions.

The controlling opinion holds that if, in spite of the prohibition of the statute, a limited partnership is formed to conduct a brokerage business, the partners may avoid liability under Section 11 of the limited partnership act. That opinion holds substantially that ignorance of the law, ignorance that the old statute has been repealed, ignorance that the uniform partnership acts have been adopted in Illinois, ignorance or disregard of the provisions and requirements of either the old or the new law, all may be excused under Section 11 and the words "erroneously believing," and that such excuse may even cover the making of a false certificate as to who are the special partners and the several amounts they contributed. Violation of the law results in immunity and manifest advantage to the violator. To accomplish this, the ruling opinion lifted Section 11 out of the Uniform Limited Partnership Act, applied it to an organization which could not have been formed under that act and allowed it to be used as a cloak under which respondents may escape liability. Whether Section 11 can be so interpreted and so applied is fundamental and essential in the interpretation and continued existence of the Uniform Limited Partnership Act.

Throughout the opinion the court seems to have been misled by the idea that it is not affirmatively shown that

any person was prejudiced or injured by any concealment in this case, or that any person relied upon the liability of the concealed partners. Would this be a good answer to the small depositor of a savings bank which the promoters had attempted to organize under the limited partnership act? Certainly this reason does not apply to Hecht and Finn, for their certificate was on file, although informally, in the office of the county clerk. It was as much notice in that way as if the limited partnership had been properly formed.

Moreover, this point is not good on any principle of law. A claim that a person is not entitled to recover from *all* partners because he did not know the name of one partner or that that person was a partner, is no defense in the case of a general partner. There are many firms with only two persons appearing in the firm name that have eight or ten partners, and the public knows little about those not named, but they are all liable. The contention that no one who did not rely on the name of one of these partners can recover would do away with all the law ever written on the liability of an undisclosed principal and would bring it about that a man whose name did not appear in the firm and who claimed that he was only a special partner could not be held liable. Such a doctrine would probably do away with the liability of one-half of the partners in our present commercial system.

The conclusions arrived at by the Court of Appeals cut down the liability of partners and the remedies of creditors to an extent never before dreamed of, and to an extent that we do not think will be followed by the courts of the states in which the Uniform Partnership Acts have become laws. There is almost a license given for persons to associate themselves together in the banking or brokerage or insurance business in Illinois as a

limited partnership, to make all they can out of it, and then having received the deposits and trust of many people, simply to say, when bankruptcy comes, that they "erroneously believed" they were acting in compliance with the law and now that their attention has been called to their flagrant disregard of the statutes, they will return the profits they have made and go scot-free.

Had this firm been successful, had large profits been realized, respondents would have, in proportion to their contributions, profited thereby. They had power to close the business. For the manner in which the business was conducted and for its present condition, they, not the public and not the creditors, are responsible. Theirs should be the loss. There is no hardship, there is no inequity in holding those who owned the business and who would have realized the profits had the business been successful, liable for its debts.

Respondents have not brought themselves within the terms of Section 11 or complied with its proviso, and cannot claim the benefit of it.

Even, however, were Section 11 applicable to any attempt to form a limited partnership under the Act of 1874, it would not avail respondents. That section exonerates a person who has contributed to the capital of a business "erroneously believing" he has become a limited partner in a limited partnership, etc. Good faith is essential to invoke Section 11. The last clause provides for renouncing profits as soon as a "mistake" is discovered. It was not intended to protect those who intentionally concealed material facts required by the statute to be disclosed, and renounced after discovery and exposure of such deceit. It was not intended to protect those who make a consciously false statutory certificate.

Respondents could not in good faith have "erroneously

believed" that they had become limited partners in a limited partnership. They found it necessary to circumvent a rule of the New York Stock Exchange. In order to do so, they were willing to and did violate the one most essential, most vital provision of all limited partnership acts, including both the old and the new Illinois acts—full disclosure of the names and contributions of the limited or special partners.

Respondents did not renounce all interest in the firm or return all profits, and cannot therefore claim the benefit of Section 11.

Even taking it that Section 11 of the new limited partnership act could be applied to limited partnerships formed under the Act of 1874 and which have not filed under the provisions of the 1917 act, respondents (other than Hecht and Finn) cannot claim the benefit of Section 11. Hecht and Finn tendered to the receiver in bankruptcy $46,000, claiming that amount to be the aggregate of all received both by themselves and the other respondents from the firm. Hecht and Finn furnished the whole amount tendered. (Rec., 891.) The other respondents refused to allow or permit the tender to be made in their names. (Rec., 896-7.) They have to-day, each of them, in his pocket, every dollar he received from Marcuse & Co. by way of profits or otherwise.

They have not "renounced" their interest in the partnership. They persistently declared they were not special partners and never had considered themselves as such under the second agreement. They maintain that position still in their pleadings, and therefore they could not on their own theory have "erroneously believed" that they were limited partners. They expressly declined to authorize Hecht and Finn to make a renunciation for them or in their name and have personally made no such

renunciation. Without refunding profits received and without renouncing future interest in the profits, they claim the advantage of Section 11.

This opinion stands as the final expression of the federal courts on this far-reaching and anomalous effect given Section 11, and if ratified by a refusal of this court to review it, must stand as the recognized law of those courts. We believe, however, that the opinion of the Court of Appeals so misconstrues the Illinois Uniform Limited Partnership Act that the final courts of Illinois cannot and will not follow it, and we will have diversity instead of uniformity in our uniform partnership acts. We believe that the interpretation placed on the act by the Court of Appeals is squarely opposed to the intention and purpose of the act, and that in some most important particulars it nullifies the uniform act. In the interest of harmonious and rational work of the Commission on Uniform Laws, this decision should be reviewed by the court. This is especially true, as the four federal judges who passed on this question in this case were evenly divided in opinion.

III.

RESPONDENTS ARE GENERAL PARTNERS AT COMMON LAW, AND IF NOT, THEN UNDER THE UNIFORM GENERAL PARTNERSHIP ACT OF 1917. THE COURT ERRED IN HOLDING THAT NO PARTNERSHIP RELATION OF ANY KIND EXISTED.

The last part of the opinion of the Court of Appeals discusses what would result if Section 11 is not applicable and does not exonerate respondents. The majority opinion holds that even if Section 11 is not applicable the respondents are not liable as partners.

Section 6 (1) of the Uniform General Partnership Act.

Section 6 (1) of the Uniform Partnership Act (quoted by the court in the majority opinion) defines a partnership as "an association of two or more persons to carry on as co-owners a business for profit." This is but an adaptation of the common law definition of partnership as given in the best considered cases (*Meehan* v. *Valentine,* 145 U. S. 611; *State Bank* v. *Butler,* 149 Ill. 575).

The majority opinion held that respondents do not come within this definition of a partnership, and said, "The contractual relation of petitioners does not fall within this definition." And referring to the respondents other than Hecht and Finn, the court said that they *"do not by the finally executed contract purport to have entered into any partnership arrangement of any sort."*

What then was their relation? They were associated together. They were engaged in the business for profit. They were carrying it on as co-owners. They each contributed capital. They shared in the profits in proportion to the capital they contributed. They were to bear losses in the same proportion. On dissolution of the partnership the assets were to be distributed among them. What element is lacking to constitute a partnership within the definition of the Uniform Act?

In further reasoning to the conclusion that no relation of partnership existed in this case, the court referred to the first part of Section 7 of the Uniform General Partnership Act, which is:

> "In determining whether a partnership exists these rules shall apply:
> (1) Except as provided by Section 16, persons who are not partners as to each other are not partners as to third persons."

(Section 16 relates to partnership by representations, and has no application.)

The Court of Appeals then, in connection with the provision of the act just quoted, declared that *intention* to form a partnership was a fundamental requisite to a partnership, that if such intention was lacking the cooperating parties could not be held as partners as between themselves, and that, as the law just quoted provides that "persons who are not partners as to each other are not partners as to third persons," therefore persons could not be partners as to third persons unless they *intended* to be partners to each other.

Following this line of reasoning the court then divided partnerships into general and limited, and further held that if parties intended to be limited partners, but were not so through violating some statute, they could not be held as general partners. Although they had intended to be partners of one kind, they could not be held to be partners of another kind.

Upon this fallacious reasoning the court held that as respondents intended to become limited partners but failed to become so under either the old or the new law, and as the *intention* to become one kind of a partner did not include becoming another kind of a partner, and as they did not intend to become general partners, therefore, *they were not partners at all.* It would be hard to conceive a more illogical deduction.

In support of this reasoning the court, conscious that it was construing an Illinois law, cited five Illinois cases and one opinion of this court (*Goacher* v. *Bates,* 280 Ill. 372; *Smith* v. *Knight,* 71 Ill. 148; *Grinton* v. *Strong,* 148 Ill. 587; *National Surety Co.* v. *Townsend Brick Co.* 176 Ill. 156; *Insurance Co.* v. *Barringer,* 73 Ill. 230; and *London Assurance Co.* v. *Drennen,* 116 U. S. 461.)

In the *Goacher* case a live stock trader obtained money from a bank, his account being guaranteed by the cashier

thereof, who was to receive for his guaranty part of the profits but not stand any losses. An accounting was asked on the basis of a partnership. The court held that there was no partnership.

In the *Smith* case money advanced to a partnership was to be repaid with interest and as extra compensation for the loan part of the profits of the business was to be paid, but the lender was not to be responsible for losses. The court held that no partnership was intended.

In the *Grinton* case Grinton was to take complete charge of certain property, superintend expenditures on account of it, collect rents, etc., and was to receive 3% of amounts collected for rents and a certain amount of the profits if the property was sold. Brinton asked for an accounting, claiming he was a partner. The court held he was not a partner.

In the *National Surety* case, the surety company resisted liability on a surety bond on the ground that the contractor had taken a subcontracting firm practically into partnership with him and thereby voided the bond. The court held there was no partnership and the surety company was defeated.

The *Barringer* case was also a loan of money to a partnership together with some guaranty of credit, but the lender of the money was never interested in any profits or lossess. An insurance company defended on the ground that the lender of the money had become a partner whereby a new partnership had been formed which the insurance policy would not protect. Held no partnership and the insurance company was defeated.

In the *London Assurance Company* case the insurance company interposed a defense that by the admission of

a new partner the firm had been changed so as to avoid the policy of insurance sued on. The insurance company was defeated. The syllabus of the case being:

> "An agreement by A with B that on the payment of a sum of money B shall participate in the profits of A's business, gives B no interest, as between themselves, in A's stock in trade, when it appears that it was their intention that he should have no such interest."

In all of these cases the courts, as was to be expected, dwelt particularly on whether there was an intention to form a partnership and in each of them found there was no such intention. The courts repeatedly said that *as between the parties* there was no partnership. They also repeatedly laid down the doctrine that partnership did not depend upon the language used but upon what was done. The parties might declare themselves to be partners and yet not be partners; might declare themselves not to be partners and yet be partners, and that they might not be partners as between themselves and yet be partners as to third persons.

We submit that none of these cases are in point and that they do not support the ruling opinion.

The Court of Appeals also held that under the law as it was prior to the adoption of the Uniform Partnership Act, the existence of a general partnership "as between the parties themselves" was wholly a question of intention, and that therefore under Section 7 of the Uniform Act persons who did not intend to be partners as to each other cannot be partners as to third persons, and therefore the respondents were not partners at all.

This interpretation and application of Section 7 makes that section work a radical change in the law of partnership. It gives that section a very far-reaching effect indeed.

Under that section as it is interpreted and applied by the Circuit Court of Appeals, several persons, as respondents in this case, can associate themselves together, contribute capital to a banking or brokerage business, share profits and losses, enjoy all the advantages of a partnership, and then, when insolvency comes, if it can be made to appear that, although intending to enter into a relation with all the incidents of a partnership, they did not intend to be partners *inter se*, they are not liable as partners to third persons and escape all liability.

At common law it was the intention to enter into a relationship to which the law thereupon attached a partnership liability that was the criterion of a partnership.

The meaning of "intention" when used in ascertaining whether a partnership exists is a legal intention shown by acts, and as we are discussing the construction of an Illinois act, we cannot show what intention means better than is shown in the Illinois case next cited and by the authorities following it.

In *Fougner* v. *First National Bank*, 141 Ill. 124, it was said (p. 132):

> "While the intention of the parties is the criterion by which to determine whether or not a partnership has been formed, yet, as said by Justice Matthews in his work on Partnership (page 12, Sec. 31): 'It is very plain that parties cannot by agreement, enter into a partnership, and at the same time agree that what they have entered into shall not be a partnership.' Or, in the language of Breese, C. J., in *Lintner* v. *Millkin*, 47 Ill. 178: 'Parties may become partners without their knowing it, the relation resulting from the terms they have used in the contract or from the nature of the undertaking. They may make a bargain together without knowing it, which creates or involves a partnership, and subjects them to the law of partnership."

Meehan v. *Valentine*, 145 U. S. 611, is probably the leading case in this country on partnership. In that case Mr. Justice Gray undertook, after careful analysis of the cases, and sources of the law, to lay down some fundamental principles covering the law as to creation of partnerships. His conclusion was (p. 623):

> "In the present state of the law upon this subject it may perhaps be doubted whether any more precise general rule can be laid down than, as indicated at the beginning of this opinion, that those persons are partners who contribute either property or money to carry on a joint business for their common benefit and who own and share the profits thereof in certain proportions. If they do this, the incidents or consequences follow that the acts of one in conducting the partnership business are the acts of all; * * * that all are liable as partners upon contracts made by any of them with third persons within the scope of the partnership business; *and that even an express stipulation between them that one shall not be so liable, though good between themselves, is ineffectual as against third persons.*"

Textbooks state the same doctrine. In 20 Ruling Case law, p. 833, it is said:

> "The intent, the existence of which is deemed essential, *is an intent to do those things which constitute a partnership.* Hence, if such an intent exists, the parties will be partners notwithstanding that they intended to avoid the liability attaching to partners or even expressly stipulated in their agreement that they were not to become partners. It is the substance, and not the name, of the arrangement or contract between them which determines their legal relation toward each other."

Likewise in 30 Cyc., page 360, it is said:

> "When a court is called upon to determine whether a particular contract constitutes a partnership between the parties thereto, its controlling purpose is to ascertain their intention as that is disclosed by the entire transaction. But the intention which controls in determining the existence of a partnership is *the*

> *legal intention deducible from the acts of the parties,* and, if they intend to do a thing which in law constitutes a partnership, they are partners, although their purpose was to avoid the creation of such relation. Particular clauses in the contract, or even express statements that it does or does not constitute a partnership, are not conclusive upon the subject."

In holding that where parties intended to form a limited partnership but failed, they did not and could not become liable as general partners because they did not intend to be such, the court's construction of the statute is in direct conflict with the decisions of the Illinois courts, which have repeatedly held that on failure to secure the statutory protection through noncompliance with the limited partnership act, the partners *become liable as general partners.* In *Henkel* v. *Heyman,* 91 Ill. 96, the parties failed to properly file the statutory certificate and the court, holding them liable as general partners, said (p. 101):

> "The common law did not admit of partnerships with a restricted responsibility, and the statute, therefore, authorizing limited partnerships must be substantially complied with, *or those who associate under it will be liable as general partners."*

In *Manhattan Brass Co.* v. *Allin,* 35 Ill. App. 336, where the court found the certificate did not meet the statutory requirements, it was said (p. 341):

> "It may be a hard case, and contrary to what the parties intended but did not express, to hold the appellees other than B. C. Allin as general partners; but the law is settled that 'the statute authorizing limited partnerships must be substantially complied with, *or those who associate under it will be liable as general partners."*

In *Walker* v. *Wood,* 69 Ill. App. 542 (affirmed 170 Ill. 463), one of the purported limited partners had signed

requisite certificate by an agent and the court said (p. 549):

> "The case presents important questions but we sum up our opinion by saying that the statute under which limited partnerships may be formed was not complied with, and *unless that is done the partnership is general.*"

The decision of the Court of Appeals, therefore, is directly in conflict with the decisions of our state courts and creates an unfortunate divergence of judicial decision in this circuit.

There are many other authorities to the same effect. In 19 A. & E. Enc. of Law, 2nd Ed., p. 339, under the head of "Limited Partnerships," it is said:

> "Generally a noncompliance with the statute will render the special partner *liable as a general partner.*"

And again (p. 343):

> "The statutes authorizing the formation of limited partnerships all provide in what business such partnerships may engage. A limited partnership cannot be formed for the transaction of any business not authorized by statute, and an attempt to do so renders the firm an ordinary partnership *in which all the members are generally liable.*"

And again (p. 353):

> "A false statement in the affidavit renders all members *liable as general partners,* and it is immaterial whether or not the special partner knew of the false statement or whether it was made intentionally or unintentionally, *or whether creditors were injured by it or not.*"

Many cases are cited in support of the text.

The interpretation put upon Section 7 by the Court of Appeals changes this long-established law and makes the intention to form a partnership *inter se* the final test of partnership as to third parties. If that intention was

not present, there is no partnership under any circumstances.

That the court realized that its interpretation of Section 7 worked a substantial change in the law of partnership is evidenced by its statement that with the wisdom of such a change of policy it was not concerned, and that if, under the construction given the statute the new test of partnership proved impracticable in experience, the remedy was with the legislature alone.

We do not believe the commissioners on uniform state laws, or the legislatures of Illinois and other states, in enacting the uniform general partnership law, intended any such far-reaching effect by Section 7. Section 6 defines a partnership. Under the court's interpretation of Section 7, although all the elements of a partnership as defined in Section 6 are present, if the parties did not intend between themselves to become partners, a partnership did not exist.

The further subdivisions of Section 7 explain its purpose. It is provided that a mere joint tenancy or common ownership of property or the sharing in gross profits or returns received, as interest on a loan, wages of an employee, annuity to a widow of a deceased partner, consideration for the sale of good will of the business, etc., do not constitute a partnership. This but declares a common law principle, except that a few courts have held that sharing in profits was a conclusive test of partnership and made the parties liable even though the profits were received as compensation by an employee, for a loan of money, etc. Section 7 was intended to clarify and unify the law of partnership in this regard.

However, as above interpreted and applied by the Court of Appeals, Section 7 is not a codification of the present law on partnership but works a most radical

change in that law. This interpretation will cause much uncertainty and confusion. If the Court of Appeals' interpretation is correct, no doubt those states that have adopted the Uniform General Partnership Act will wish by proper amendment to undo the mischief brought about by this section. No doubt, the commissioners on uniform law will wish to amend the draft of the act before submitting it for passage in other states. If, however, that court gave a far wider meaning to Section 7 than is justified by proper interpretation and its construction is not correct and is not to be followed by other courts, it would be a misfortune to amend the act and destroy its uniformity.

The development of the law by the commissioners on uniform laws is a very important juristic work. A final, authoritative interpretation of those statutes, and especially of Section 7 of the uniform act is necessary for the future guidance of the Commission on Uniform Laws.

Respondents Did Intend to Form a Partnership Between Themselves.

To apply its interpretation of Section 7 and of the law of intention to this case, the Court of Appeals found as a fact that the respondents did not intend to become general partners as between themselves. As there was evidence to the contrary and as the District Court evidently found to the contrary, we do not see how the Court of Appeals could consider that question of fact.

To show how erroneous is such finding by the Court of Appeals, and that the parties *did intend* to enter into a partnership, we submit the following extracts from the final partnership agreement of April 2nd (signed June 30th). The first recital is:

"Whereas the said parties *desire to become part-*

ners with one another under the name of Marcuse & Co." (Rec. 26.)

"(1) The said parties above named have agreed *to become copartners in business* and by these presents do agree *to be copartners* to one another under the firm name and style of Marcuse & Co. in the brokerage business of buying and selling for others on commission, stocks, bonds, grains, provisions and various commodities." (Rec., 26.)

"(6) It is further hereby agreed that all of the capital to be contributed as aforesaid, shall be used and employed by *the said partnership* for the purpose of carrying on the business agreed to be conducted under the terms hereof, and for no other purpose." (Rec., 27.)

"(12) Each of *the said partners*, both general and special, shall receive 6 per cent interest upon the capital contributed by him to the capital or capital stock of said firm and said sum shall be charged to the expense of operating the said business." (Rec., 29.)

"All of the balance of the said net profits of said business shall be divided among all of the parties hereto except the said Morris in the proportions in which they have contributed to the capital or capital stock of said firm." (Rec., 30.)

"All losses of every kind sustained in said business shall be paid by the *said copartners* in the same ratio and proportion as said profits are divided." (Rec., 30.)

The partnership agreement signed June 30th was signed by Marcuse, Morris, Hecht and Finn. (Rec., 33.) The so-called Hecht and Finn trust was signed by Hecht and Finn (Rec., 40), and on the succeeding page a certificate is attached thereto signed by Marcuse, Morris, Hecht and Finn "individually *and as copartners* under the firm name of Marcuse & Co."

There is hardly a paragraph in the agreement which does not refer to the parties as partners and the agreement as a partnership agreement.

The parties therefore understood and *intended* to enter into a partnership relation. They may have hoped or

intended to become limited partners but they did intend to become partners as to each other.

Conclusion.

The brokerage firm of Marcuse & Co. started business in Chicago on July 2, 1917. It continued in business for two years, incurred heavy liabilities and then failed for a large amount. It was admittedly not a limited partnership under the Act of 1874. It admittedly was not and could not have been a limited partnership under the Act of 1917. Yet, by an interlapping and interpretation of the uniform limited and uniform general acts of 1917, this organization was held not to be a partnership at all, and respondents, the owners of the business, sharing in its profits and its losses, not to be liable for its debts.

In reaching this remarkable result, the majority of the judges held that Section 11 of the Uniform Limited Partnership Act applied to an organization attempting, but failing, to organize as a limited partnership under the Act of 1874. They disregarded or refused to follow decisions of the Illinois courts directly in point. They construed Section 7 of the Uniform General Partnership Act to relieve respondents from all partnership liabilities to third persons. The district judge held otherwise and one of the judges of the Court of Appeals dissented, so that these far-reaching interpretations of the uniform partnership acts stand with the judges divided.

Unless this decision is reviewed by this court and an authoritative interpretation of these important sections of the two uniform partnership acts obtained, the work of the uniform commission will be seriously hampered.

We believe that the proper construction of these acts is a matter of such general public interest that this court, to assist the development of the work of the Uniform Commission, should review this case.

Because we believe the Court of Appeals has made a serious error in construing the sections of the Uniform Partnership Act involved in this cause, because we believe the construction given by it to those acts will bring infinite confusion into the law of partnership, while the intention is to make it uniform, because we believe that in the furtherance of the work and furtherance of the efforts of the commissioners on uniform laws, clear, authoritative, rational interpretation should be given to these acts, because we believe that questions of such importance ought not to stand upon the decision of a divided Court of Appeals overruling the *nisi prius* court, because we believe that uniformity and not divergence should prevail in construing the uniform partnership acts, and because we believe a great injustice has been done to our clients and to many other creditors of Marcuse & Co., which will entail great loss to the creditors and allow the owners of this great business to go scot-free, we respectfully present this petition for a writ of *certiorari* and this brief in support thereof.

CHICAGO, June, 1922.

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APPENDIX.

IN THE

United States Circuit Court of Appeals

FOR THE SEVENTH CIRCUIT.

No. 2855. OCTOBER TERM, 1921, JANUARY SESSION, 1922.

In the Matter of Marcuse & Co., Alleged Bankrupts.

Henry Vette, Peter M. Zuncker, Theodore Regensteiner, Clement Studebaqer, Jr., and George M. Studebaker, *Petitioners,*

vs.

C. B. Giles, John Janca, I. Fiegel, Fred Mayer, E. H. Allen, *et al.*, *Respondents.*

Petition to review and revise order of the District Court of the United States for the Northern District of Illinois, Eastern Division.

Before ALSCHULER, EVANS and PAGE, *Cir. JJ.*

Petitioners seek review and revision of an order of the District Court of July 1, 1920, finding in effect that petitioners, and Hecht, Finn, Marcuse and Morris were general partners of the firm of Marcuse & Co., against which original and supplemental petitions in bankruptcy had theretofore been filed, alleging all to be general partners, and referring the petition to a referee to ascertain the solvency of all of them as "composing the firm of Marcuse & Co." After filing of the petition to review and revise,

Hecht and Finn, though not petitioners, joined in the petition and asked review and revision of the order. They will, with the others, be considered and referred to as petitioners, Hecht, since deceased, appearing by his executor.

The record discloses that under date of April 2, 1917, all the alleged partners except the Studebakers (one Hoffman signing in his own name, but in fact as representing the Studebaker interest), executed an agreement which provided for carrying on at Chicago a brokerage business of buying and selling on commission stocks, bonds, grains, etc., for a period of five years from such date, under firm name of Marcuse & Co.; that such firm be a limited partnership under the statute of Illinois, Marcuse and Morris the general partners, and the others special partners; the contributions of the latter to be, Hecht $25,000, Hoffman $50,000, Vette $30,000, Zuncker $25,000, Finn $31,500 and Regensteiner $28,500 total $190,000; that the business be conducted and managed by Marcuse and Morris, they to receive named salaries, and that on the contributions of Marcuse, Morris and of the special partners should be paid interest at 6 per cent pr annum; that thereafter 25 per cent of the net profits be paid to Marcuse to be applied by him on certain certificates which he would issue representing debts due from Von Frantzius & Co. (then in bankruptcy), all of such limited partners, except Vette and Zuncker, being large creditors of the Von Frantzius concern; and that after such certificates are paid, the said 25 per cent should be paid to all the parties to the agreement except Morris; that 10 per cent of the net profits of the business was payable to Morris, and the balance of profits was to be divided periodically between the parties in proportion to their contributions to the whole capital; that the special partners be limited in their liability to

the amounts respectively contributed to the capital, and that they should have no liability for debts of the partnership beyond such contributions; that Marcuse and Morris should be in charge of and carry on the business, and that the special partners shall have right to examine the books and have them audited, and in certain contingencies to have the business liquidated. After execution of the agreements they were left with one of the lawyers pending carrying out of certain conditions, mainly the dismissal of the Von Frantzius bankruptcy proceedings, with which concern Marcuse had been in some way connected.

One of the contributions of Marcuse toward the firm's capital was a seat on the New York Stock Exchange estimated to be then worth $68,000. When in New York shortly after the agreement was signed, Marcuse learned that under the practice of the New York Stock Exchange, firms doing business there were not permitted to have more than two special partners, who must not be engaged in any other business. Marcuse at once notified his attorney in Chicago, and after further negotiation between the parties concerned or their representatives, another agreement was signed June 30, 1917 (but dated April 2, 1917), wherein the general partners were stated to be Marcus and Morris, and the special partners Hecht and Finn. The stated objects of the partnership, the name and the details respecting rights, duties and immunities of the parties, and the character and amount of capital contributions were in all essential features the same as under the first contract, except that Hecht and Finn, the special partners, each agreed to contribute $95,000, and the term was five years from July 1, 1917. At the same time there was executed by Hecht and Finn an instrument under date of June 30, 1917, known as the "Hecht-Finn Trust," in which Hecht and Finn were

named as trustees, wherein after reciting the last named partnership agreement as being attached as an exhibit, and that Hecht and Finn held in trust all interest in the assets and income coming to them under said partnership agreement, it is provided that the trustees shall direct that any distribution to be made to them by the partnership under the terms of the partnership agreement be paid over by the partnership to the Chicago Title & Trust Company on account of the "Hecht-Finn Trust," to be by the Chicago Title & Trust Co. distributed among the holders of trust certificates under the Hecht-Finn Trust. It was provided that these trust certificates should be issued by the Chicago Title & Trust Co. to evidence 380 shares each of $500, and that the interest represented should be subject to the terms and conditions of the Hecht-Finn Trust; that the certificates were transferable only upon the books of the Chicago Title & Trust Co., and that the original certificate holders and holdings should be, Hecht 50, Finn 63, Hoffman 100, Regensteiner 57, Vette 60 and Zuncker 50, a total of 380, or $190,000. It was agreed that the profits earned by the partnership should be drawn out at least twice a year, and the Hecht-Finn share be paid by the partnership to the Chicago Title & Trust Co., and by it ratably distributed among the registered holders of the certificates. It was provided that in certain contingencies the certificate holders might name an auditor to audit the accounts of the firm, and that in the case of the death of Hecht and Finn, certificate holders might choose another to be the special partner in the concern.

The trust instrument was by endorsement thereon assented to by the Chicago Title & Trust Co. and by Marcuse and Morris, who agreed to do all things therein provided to be done by the partnership. On June 30th the parties met and delivered their respective checks for the

amount of their several contributions (representing in each case the amount of the Hecht-Finn Trust certificate holding), the checks of the certificate holders being made to Hecht and Finn who endorsed them to the firm. The check of the Studebaker interest was one of the Studebaker Bros. Trust to Hoffman, who endorsed it to Hecht and Finn as trustees, they in turn endorsing it to Marcuse & Co. Some days later the trust certificates, dated June 30th, were issued in the amounts and to the persons as stated, the Studebaker certificate being issued to Hoffman, who at once endorsed it over to Mr. Gardner, secretary of the Chicago Title & Trust Co., for the Studebaker Bros. Trust. A certificate of limited partnership, drawn in accordance with the then limited partnership law of Illinois, was duly executed. It was dated April 2nd, signed by Marcuse, Morris, Hecht and Finn, recited contribution of $95,000 each by Hecht and Finn, and that the partnership was to commence July 1, 1917, and terminate June 30, 1922. Acknowledgment and oath were dated June 30th. The first partnership contracts were never delivered, and it was testified that some time in July they were canceled by tearing off the signatures thereon.

June 30, 1917, was Saturday, and the banks and county offices closing at noon, the transaction could not be completed that day. The following Monday, July 2nd, the certificate of limited partnership was filed in the office of the County Clerk of Cook County, and the checks were all deposited to the credit of the firm, excepting that of Hecht. As to this Hecht had requested Marcuse to withhold temporarily deposit of it, and it was not deposited until about the end of July. It appears that Hecht's bank account was during all that month prior to the deposit of his check, much smaller than the amount of this check. His banker testified that had the check

been deposited at any time it would have been paid regardless of his balance. The supposed limited partnership of Marcuse & Co. began to transact business July 2, 1917 (although for some time theretofore Marcuse and Morris had been carrying on the brokerage business under the same name at the same location), and continued in business until the filing of the petition in bankruptcy in March, 1920.

The "Studebaker Bros. Trust" was made in 1916 between petitioners George M. and Clement Studebaker, "Grantors," the Chicago Title & Trust Company, "Trustee," and Scott Brown, "Manager." It recites that the grantors had delivered to the trustee certain moneys and properties of value as stated in the schedules, and contemplated the delivery of other money and property owned by the grantors, and that the grantors are desirous of creating such money and property into a trust fund to be employed and operated for the use of the grantors; that the *corpus* of the trust fund shall be ultimately divided between the grantors in proportion to their contributions thereto. It sells, assigns and transfers to the trustee all such moneys and properties, to be held by the trustee under the enumerated terms of the trust. Brown was to be manager, in charge of the office, and to keep books of account, and with the grantors constituted the first board of directors. The directors had power to direct the policy of the trust, and the investment of the trust funds, and Brown was subject to removal as director by the other two. He was to receive a salary, and had a contingent interest in the profits of the trust. The grantors were to be beneficially interested in the trust fund and its income and profits in proportion to their contribution.

On July 1, 1917, there became effective in Illinois the Uniform General and Special Partnership Statutes. The

latter made radical changes in the law of Illinois regarding limited partnerships, in the matter of their formation and manner of manifesting same, and provided *inter alia* that thenceforth there shall be no special or limited partnerships formed in the State of Illinois for carrying on brokerage business. It repealed the prior statute on limited partnerships.

Shortly after it appeared in the bankruptcy proceedings that it was contended on behalf of creditors of the firm that no limited partnership was in fact effected, and that all the petitioners herein became under the law general partners with Marcuse and Morris, Hecht and Finn unconditionally tendered and paid into court $46,000 for the alleged bankrupt estate by way of interest and profit paid out by the firm to the investors of the entire $190,000 since the organization of the firm, including interest thereon from time of payment, such payment being made on the theory that thereby they were relieved from general partnership liability by virtue of Section 11 of the Uniform Limited Partnership Act. The uncontradicted evidence is that the amount thus paid was sufficient to cover these items. The payment, although of an amount equal to what was thus received by all the certificate holders, was made by Hecht and Finn without the consent or approval of the others, and without contribution on their part thereto.

Apart from the documentary evidence, there was oral evidence tending to show that the first limited partnership contract was completely abandoned, and that thereafter the Studebakers and Vette and Zuncker absolutely declined to enter into any limited partnership whatever, and that the final contract, including the Hecht-Finn Trust, was in good faith what it purported to be, and to no extent a device for carrying out the plan of the first contract, and circumvent the rule of the New York Stock

Exchange respecting limited partners. Other oral evidence tended to establish such intended circumvention as the real purpose of the later papers, and that the true intent of all the parties was to carry out the terms of the limited partnership contract as it was first proposed.

Opinion by ALSCHULER, *Cir. J.*, after making foregoing statement:

The primary issue is whether under above stated facts petitioners are liable as general partners with Marcuse and Morris. Then there is the question whether, in case Hecht and Finn are so liable, the liability can be extended also to the other petitioners, who do not by the finally executed contract purport to have entered into any partnership arrangement of any sort, and the further question whether the Studebakers can in any event be held general partners in view of the fact that the Studebaker contribution was made by and for "Studebaker Bros. Trust." The various contentions will be stated as they are below considered.

For respondents it is strongly urged that the reduction of the first agreed number of special partners from five to two, and the "Hecht-Finn Trust," with certificates to manifest the interest of each contributor, was a fraud and a device conceived for the purpose of avoiding the objection of the New York Stock Exchange to limited partnerships having more than two special partners, and to any special partners being engaged in other business. There was evidence from which the District Court could have reached this conclusion; and doubtless it did so conclude; and such conclusion of fact, reached upon contradictory evidence, we may not disturb in this proceeding to review and revise as to the law. But would such

finding warrant the conclusion that the ostensible limited partners, and the certificate holders all became general partners with Marcuse and Morris? Applying to the transaction the epithet of fraud does not change its true nature or its incidents. If it had been intended that all should be general partners, and the device was for the purpose of concealment, and protection of some from general liability, the court would look through the form to the actual intent and purpose of the parties. But the record affords not even suggestion of such intent. If the contribution of $190,000 was in good faith made to the capital of the partnership, it is not readily understandable what material difference it would make whether it was in fact contributed by two or by twenty. It does not appear that by such device to avoid the stock exchange ruling, the creditors of the partnership were in any degree defrauded or periled. If the New York Stock Exchange is a creditor, and has been to its detriment misled through the alleged fraudulent device, its rights and remedies against those who participated therein remain unaffected by the bankruptcy. But in the entire absence of any showing of detriment occasioned thereby to the creditors generally, or in fact to any of them, the utmost that could be visited upon the participants of this deception would be to hold that they occupy toward this partnership, and its creditors, the same relation as do Hecht and Finn, viz.: that of such who from July 1, 1917, erroneously believed and assumed that they then entered upon a limited partnership. Assuming therefore that the transactions of June 30th and July 2nd were colorable in that, while a limited partnership was intended as to all the petitioners, it was carried out in form to deceive the New York Stock Exchange as to the number of its special partners, this deception would not of itself serve to fasten on the deceivers the liability of general

partners. Respondents urge that in this statement of the contributors as set forth in the filed certificate there was such falsity as under the old Illinois act would result in all becoming general partners, notwithstanding the stated total was in fact contributed. Under the rigors of the old law this might have been so, but the contention of unlimited liability rests mainly on the nonapplicability of the old statute, through failure to complete the organization and begin business thereunder, and file the limited partnership certificate until after the repeal of the act requiring it, and the resultant nonapplicability of the old statute.

It is apparent that none of the parties to the contract, or the certificate holders under the Hecht-Finn Trust contemplated or supposed that general partnership liability was assumed by any of them except Marcuse and Morris; and it was the evident understanding and belief of all that the others, whether called special partners or certificate holders, would have no liability beyond their investment, and no participation in the conduct and control of the business, which was by the agreement committed wholly to Marcuse and Morris. Had the limited partnership been fully perfected while the Act of 1874 was yet in force, these investors would probably have incurred no liability beyond their investment. At any rate this was their intention, regardless of whether under the circumstances under that law this would have been the result.

If under the old law the certificate or affidavit filed was materially false, the statutory result was to make all liable as general partners. Many other states had or have similar statutory provisions, and the courts have quite generally construed such provisions strictly against the limited partners. To such extent was this tendency recognized in the mercantile world that it was considered

hazardous for one to invest money in a partnership enterprise upon the faith of compliance with limited partnership statutes, which were quite commonly regarded as a trap to catch the unwary rather than a proper means to a desirable end.

To relieve from such undue hazard, and make more safe to investors not participating in the business, the employment of their capital in partnership enterprises, as well as to bring about uniformity in such matters, the "Uniform Limited Partnership Act" was drafted, and submitted to the legislatures of the different states. Several of the states have adopted it. It passed the Illinois Legislature as drafted, in June, 1917, and became a law without the governor's signature June 28th, effective three days afterwards, July 1, repealing the Act of 1874.

It indicates a policy with respect to this subject quite the reverse of that of its predecessor. While Section 8 of the old act provided that the limited partnership shall not be deemed formed until the certificate as specified has been filed, and that any false statement in the certificate required to be signed by all the parties, or in the affidavit required to be signed by one of them, shall result in all the persons being general partners, the provisions of the Uniform Limited Partnership Act as to such matters are significantly otherwise. Section 2 provides that the limited partnership is formed when there has been *substantial* compliance in good faith with the requirements of the law, and as to false statements Section 6 provides, not that thereby general partnership results as to all, but only as to those who executed the certificate knowing it to be false, and in favor of those only who suffer loss through reliance thereon. Provision is made for admitting other limited partners, and for the assignment of limited partnership interests, and for the limited partner to loan money to, and transact

business with the partnership as an outsider might do, and for one to be at the same time a limited and a general partner. Section 24 provides for amendment of the certificate when there is a false or erroneous statement therein, or when the members desire to make in it any change that shall accurately represent the agreement between them. To insure construction as of remedial legislation, Section 28 provides that the rule of strict construction of statutes in derogation of the common law shall not apply to the act. Section 11 provides that "a person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with a person or in a partnership carrying on a business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

Although on July 2, 1917, when this supposed limited partnership deal was supposedly consummated through delivery of the executed agreements, filing of certificate, deposit of checks and beginning of the business, and from that time to the time of the bankruptcy all the parties were under the belief that they were a limited partnership duly organized under the law of Illinois, it appears that in this they were clearly mistaken, because the law under which they attempted so to qualify had been repealed before their organization was completed, certificate filed, and business begun, and they did not comply with the new act, either in the form of the certificate or in the filing of it for record in the recorder's office as required under the new law, the filing having been in the office of the county clerk as the old law pre-

scribed; and also because the new law provides that limited partnerships shall not be organized for the carrying on of brokerage business.

As set forth in the statement of facts the record shows that after the filing of the intervening petition charging that all were general partners, Hecht and Finn undertook to avail themselves of the provisions of Section 11 by unconditionally paying into court for the alleged bankrupt estate $46,000 which represents the profits and income which, during the course of the business, had been paid on this $190,000 of capital, with interest from time of payment, and it is the contention that this payment operates to relieve from general partnership liability the theretofore supposed special partners, including all the certificate holders under the Hecht-Finn trust.

It is earnestly contended that because the Uniform Limited Partnership Act prohibits the formulation of a limited partnership to carry on the business of brokerage, Section 11 cannot in any event afford relief. But Section 11 is very broad in its terms. It is not limited to instances where there has been an attempted compliance with the provisions of the new act. It includes in its terms any person who at any time contributed to a partnership, erroneously believing himself to be a limited partner.

There are other sections which amply provide for the correction of errors and irregularities in organization and for amendment of statements in accordance with the facts, thereby perfecting and confirming the special partnership, without incurrence of general liability. This section is not designed to amend or correct or perfect the limited partnership organization, so that it may thereafter continue as such, but looks rather to the termination of the relation, and relief from general liability on compliance with the terms of the section in all those

cases where persons erroneously believed they had become limited partners, without regard to whether or not the belief was induced by supposed compliance with this or any other act. This view not only comports with the words of the section, but with the evident general purpose of the act to give effect, so far as may be done, to the *bona fide* intent of parties, and to relieve from the extreme consequences of honest mistakes, which the prior law and its strict interpretation entailed. The erroneous belief may be as to the nature of the business which may be organized into a limited partnership as well as to any other matter of law or of fact, which induced the error. In this respect we do not conceive Section 11 to be different in its effect as part of the new law than if it had been adopted as an amendment to the old.

It is further contended that Section 11 does not contemplate one may wait for two or three years, and until bankruptcy overtakes the concern before undertaking to have the benefit of the section. Such state of facts would go only to an issue upon the good faith of the asserted erroneous belief, and the prompt renunciation of interest in the profits and income of the business, after learning of the error. One can scarcely imagine circumstances under which error might have been more readily induced than those which this record presents. The new law had manifestly not then been published, and the three days which intervened between the time it became law and the time it became effective, hardly gave opportunity for public discussion thereon. After the business started it does not appear that there was occasion for investigation as to its organization, nor that this was challenged, until about the time the concern got into difficulty. Even the New York Stock Exchange does not appear to have questioned its validity as a limited partnership. Consideration of the very exceptional cir-

cumstances shown, induce quite inevitably the conclusion that during all the time this business was carried on, it was in the honest though erroneous belief of all connected with it, that it was a limited partnership, and that within reasonable promptness after ascertainment of the true status, it was undertaken to comply with the conditions imposed by Section 11, albeit this was after petition in bankruptcy was filed.

In the statutory condition that "he promptly renounces his interest in the profits of the business other compensation by way of income" there may be some ambiguity; but in this case the record shows the compliance was to the fullest extent that might be claimed on behalf of creditors, and it is not contended that the unconditional payment of the $46,000 falls short of compliance with the section, if the section has application. The fact that elsewhere in the act amendment, correction and perfection of the organization are adequately provided for, assist to the conclusion that Section 11 contemplated situations where a limited partnership could not under the law be formed at all, or where, because of intervening conditions, it would not be practicable to perfect or continue it.

But it is urged that in no event can Vette, Zuncker, Regensteiner and the Studebakers have advantage of Section 11, because of their denial that they ever became limited partners, and their consequent want of belief that they were such. The relief afforded by the section is to a person "erroneously believing that he has become a limited partner in a limited partnership." The instance is, and the court evidently so found, that Hecht and Finn, although appearing as the only special partners, were in truth and in fact representing as well the other petitioners herein, whose relation to the partnership was found to be not different from that of Hecht

and Finn. Their connection with the partnership being thus traced through their representation by Hecht and Finn, it follows that if such representation would operate to charge them, they should in good conscience also have the benefit of whatever Hecht and Finn may have done which would bring relief from the charge. If therefore it appears that Hecht and Finn believed themselves to be special partners (and there can be no doubt that they did so believe), their representative capacity held to exist as to a part of the contributed capital would extend and inure to those whom they are thus held to have represented. The restitution having been made on the entire $190,000 of supposed special partnership contributions, and having been of an amount sufficient for compliance with Section 11 by all the petitioners, part of them should not be denied its benefit, because of their insistence that they were not members of any partnership at all, limited or general. Limited liability is the dominating feature of a limited partnership, and petitioners, other than Hecht and Finn, resting as they did under the belief that they had effectually contracted for limited liability, it is our view that if Section 11 applies at all, the fact that their real purpose was shown to have been the formation of a limited partnership, will not deprive them of the benefit of Section 11, if the compliance with its terms included in fact all the petitioners, assuming, as we do, that the record fails to show credit was extended to the firm on the faith that petitioners were general partners.

Petitioners insist that, apart from other contentions, under the record here they are protected from a general partnership liability by the provisions of the Uniform Partnership Act adopted in Illinois passed at the same time and in the same manner as the Uniform Lim-

ited Partnership Act, and likewise effective July 1, 1917.

Let it be assumed that Section 11 of the limited partnership act has no application whatever to partnerships carrying on brokerage business, and that persons erroneously believing themselves to be limited partners in such business cannot in any event be relieved from general liability by compliance with Section 11. The rights and liabilities of such persons must then be tested by and under the law governing general partnerships, which in Illinois, from and after July 1, 1917, was the Uniform Partnership Statute.

This act, conceived and born with the Uniformed Limited Partnership Act, indicates similar purpose of relieving from risk of incurring partnership liability where the general partnership relation was not by the parties intended. It prescribes that the rule of strict construction of statutes in derogation of common law shall have no application to the act, Section 4 (1), and defines a partnership to be "an association of two or more persons to carry on as co-owners a business for profit." Section 6 (1). The contractual relation of petitioners does not fall within this definition. It cannot strictly be said that they became co-owners. They contributed $190,000 which, unless lost in the venture, would eventually be returned to them. In this respect it differed from a loan of funds to the partnership, with division of profits in compensation for the loan, only to the extent that in the one case the creditors of the partnership may resort to the amount so contributed, free from participation of any claim of the contributor as a creditor, while the loaner would for his loan be upon parity with other creditors. Petitioners had no proprietary interest in, or title to, or dominion over the property of the partnership; neither had they under the contractual relation any

right, power or duty in the carrying on of the partnership business. As to the conduct of the business they were strangers in quite the same sense that a loaner of funds would have been.

While receipt of profits has in some instances been held conclusively to presume partnership as to creditors, section 7 (4) makes this presumption *prima facie* only.

Section 9 (1) provides that every partner is the agent of the partnership for the purposes of the business. But under this contract none of petitioners had or could have had any right to do a single act whereby the partnership would have been bound. The contract either as first drawn or as afterwards entered into gave them no right or power to act for the partnership, and the record does not disclose any holding out or assumption of agency.

Section 7, under the subtitle "Tests in determining the existence of a partnership" prescribes that "In determining whether a partnership exists these rules shall apply: (1) Except as provided by section 16, persons who are not partners as to each other are not partners as to third persons."

Under the law as it was prior to the adoption of the Uniform Partnership Act the existence of general partnership as between alleged partners was a question wholly of their intention, to be gathered from their agreement. *Goacher* v. *Bates,* 280 Ill. 372; *National Surety Co.* v. *Townsend Brick etc. Co.,* 176 Ill. 156. In the last cited case it was said, "While the agreement with Adams Brothers to share one-half the profits and losses might raise a presumption of partnership, yet if the parties actually meant that there was to be no partnership created, and so contracted, the presumption would be rebutted." In *Grinton* v. *Strong, et al.,* 148 Ill. 587, the court said, "Even where parties enter into a

joint enterprise and share in the profits, a partnership, as between themselves, is not necessarily the result. The intention of the parties always controls." So in *Smith* v. *Knight, et al.*, 71 Ill. 148, where Knight agreed to put money into a commission business and was to receive ten per cent per annum, and the share of the commissions, but was not to be liable for losses, the court, passing on the alleged partnership of Knight, said, "In determining this question the intention of the parties must be considered. Written articles of copartnership may be so expressive as to leave no room for doubt. So far as these articles of agreement are concerned we discover nothing in them evidencing an intention to form a partnership." And in *Ins. Co.* v. *Barringer*, 73 Ill. 230, the court said, "Whether a partnership exists or not depends upon the intention of the parties. Parties may be partners as to third persons when not so between themselves." In *London Assurance Co.* v. *Drennen*, 116 U. S. 461, it was said, "The mere participation in profits would give no such (partnership) interest contrary to the real intention of the parties. Persons cannot be made to assume the relation of partners, as between themselves, when their purpose is that no partnership shall exist."

If we are correct in saying that, as between Marcuse and Morris on the one hand and the petitioners on the other, it was the distinct intent and purpose that there should be no general partnership, then as between themselves they did not become general partners. Undoubtedly contracts are conceivable wherein the parties may call themselves partners, where from the things actually agreed upon the partnership relation does not exist; and on the other hand, they may in terms declare they are not partners, when the very things they have agreed upon supply all the elements of partnership, and they

would become partners despite their declaration to the contrary.

By the terms of this contract petitioners were to have no participation in the conduct of the business, could not in any manner contract for or bind the firm, and were not to be liable for losses beyond their several contributions to its capital. The existence of a partnership between themselves may be tested by the query whether in case of loss of the entire capital of the concern, and payment by Marcuse and Morris of its debts, they might have contribution from petitioners as in partnership. Undoubtedly under the contractual relation here shown they could not. We conclude that in any event, as between themselves, petitioners were not general partners with Marcuse and Morris.

If section 7 (1) means what it says, then this alleged general partnership does not respond to the prescribed statutory test that "persons who are not partners as to each other are not partners as to third persons." The section is all-inclusive, and has application to alleged partnerships of all kinds, whether for the carrying on of brokerage or any other business, and wholly regardless of whether the parties were or were not acting under the belief that they had created a limited partnership. The act manifests a definite purpose of making paramount the contractual intent of the parties to the agreement, as a test for fixing a general partnership liability rather than, as often theretofore, by way of penalization for participation in profits, or doing other things which held parties to general partnership liability, when general partnership was not contemplated or intended, and was not in fact effected as between themselves.

With the wisdom of such change in policy as is manifested by the Uniform Partnership acts we are not of

necessity here concerned. There is reason for each view; but we are not at liberty to reject the test which the statute fixes. If experience shows the statutory test to be impractical and unwise, the remedy is with the legislature alone. The record discloses no such situation as would suggest that the application here of that test involves hardship or inequity toward the creditors generally. It shows nothing to indicate that creditors were beguiled into extending credit to the firm on the faith that the petitioners (particularly the others than Hecht and Finn) were general partners, nor that petitioners held themselves out as such partners, or did any other of those things which, under Section 16 of the act, might entail upon them general partnership liability.

We conclude that petitioners, not having assumed general partnership relation with Marcuse and Morris, did not as to others become partners with them.

We find no reported decisions construing the statutory provision above considered. A salutary principle of construction of statutes designed to be uniformly adopted by the states, is found in *Commercial Bank* v. *Canal Bank*, 239 U. S. 520, where the Uniform Warehouse Receipts Act was under consideration, and the court said it "should have recognition to the exclusion of any inconsistent doctrine which may have previously obtained in any of the states enacting it."

While these proceedings will in nowise interfere with any creditor of the alleged bankrupt undertaking to establish elsewhere or otherwise liability to him of any or all of petitioners by virtue of Section 16 of the Uniform Partnership Act, we find that, resolving in favor of respondent all disputed questions of fact, the law as applied to the record here does not warrant the inclusion of petitioners in the order of reference on the question of solvency of Marcuse & Co. This conclusion makes

it unnecessary to consider the proposition that the Studebaker interest in the concern belonged wholly to Studebaker Brothers Trust, and not to the Studebakers as individuals, and that therefore they can in no event be held liable as partners.

The order here under review is revised by eliminating therefrom the names of all the petitioners herein, leaving the revised order to include Marcuse and Morris only as the general partners in the alleged bankrupt firm of Marcuse & Company. Petitioners are adjudged their costs.

EVANS, *C. J.*, dissenting: In view of the large sums involved, I feel justified in setting forth somewhat fully my reasons for this dissent.

The district judge, after hearing the evidence, found that petitioners were general partners of the firm of Marcuse & Co., against whom a petition in bankruptcy had been filed. The order of reference thereupon made to determine the solvency of the partnership as enlarged, petitioners now seek to review and revise. Only questions of law are therefore presented. *In re Hoyne, Bankrupt*, 277 Fed. 668. On this record we can consider but one question: Is there *any* evidence to support the conclusion of the district judge?

The district judge failed to make specific findings of fact, but we must assume that such findings as were essential or might be necessary to support his conclusions were by him found in favor of respondents. His conclusion that petitioners were general partners makes such a position unavoidable.

Respondents urge that there was oral evidence tending to show that the written agreement of the parties was but a cover to the real understanding; that, in order to pre[illegible]e enforcement of the liability arising out

of a general partnership, the parties executed a written agreement which on its face purported to be a limited partnership. Finding that such a partnership could not transact business on the New York Stock Exchange, a new agreement was executed for the purpose of deceiving the New York Stock Exchange and with the further object of preventing any detection of the real status of the parties in case an enforcement of the partnership liability was later attempted by any creditor of the firm.

If there is any evidence in the record to support the position of the respondents, we must accept it as established. *In re Hoyne, Bankrupt, supra.* Nor are respondents limited upon this inquiry to direct evidence. Their position may find support in the inferences fairly deducible from the established facts.

Respondents, however, do not rely solely upon this contention, but assert in addition, that should we conclude, in executing the agreement under consideration, the parties intended the formation of a limited partnership only, nevertheless petitioners occupy the status of general partners in the partnership because limited partnerships to conduct a brokerage business were not authorized in the State of Illinois. My reasons for dissenting will be confined to this contention only.

Briefly it may be said that the parties to this agreement on July 2, 1917, and continuously thereafter to a date subsequent to these bankruptcy proceedings associated themselves together for the conduct of a brokerage business wherein each party contributed toward the common capital and wherein the profits were divided according to the contribution.

The status of the parties to the contract, then, must necessarily have been that of (a) limited partners, (b) general partners, or (c) creditors.

By a process of elimination we can readily exclude any finding that petitioners were creditors.

All of the evidence points to the denial of the relationship of debtor and creditor. It is not urged in this court except inferentially. The parties never intended to create such a relationship. The definite period during which the agreement was to remain in force, viz., five years, tends to disprove such a status. In the agreement we find the parties provide, "The said parties above named have agreed to become *copartners* in business and by these presents agree to be *partners to one another* under the name and style of Marcuse & Co." Also, "The net profits of said business shall be divided among the partners thereto in manner as follows. * * * All the balance of said net profits of said business shall be divided among all of the parties hereto, except the said Morris, in the proportions in which they have contributed to the capital or capital stock of said firm."

The so-called trust agreement executed by Hecht and Finn recognizes the relation of the petitioners to Marcuse and Morris as being that of partners by saying, "Whereas, under the terms and provisions of said Articles of Agreement reference to which is hereby made, the undersigned, said Frank A. Hecht and said Joseph M. Finn, by reason of their relation to said firm as special partners, are, and will from time to time become entitled to certain payments and distributions of the copartnership assets and the income, interest and profits of and upon said assets."

In the partnership agreement the so-called special partners were authorized to name auditors of the business of said copartnership who were authorized to examine the books and might certify in writing that the business was not being conducted in a "safe, conservative and judicious manner," or that the general partners

were "not properly managing the business," in which case a dissolution of the partnership was authorized at the option of the special partners. The control of the business by the so-called special partners is indicative of a partnership, and the provision for the *dissolution of the firm* confirms the conclusion that petitioners were not simply creditors.

The case is quite unlike the case of *In re Hoyne, Bankrupt*, recently decided by this court, where the parties designated themselves and treated themselves as debtors and creditors. The oral testimony of certain witnesses likewise recognized all of the parties as partners and nothing else. A finding that petitioners were not creditors, which the court necessarily made when it found them partners, must then not only be accepted on this petition to review and revise, but, it may be added, was the only finding that could be fairly reached from this record.

Not being creditors, the parties were either members of a limited partnership or members of a general partnership.

The law of Illinois, where the contract was executed and where the business of the partnership was to be conducted, must define petitioners' status. The Uniform Partnership Act covers both limited and general partnerships and was in force at the time this contract went into effect. It is idle to discuss the history of the passage of this Act. Whether it received the governor's signature or became effective by operation of law, whether it had long been in effect, or not, are questions apart and disassociated from the question of construction. The Uniform Partnership Act represents the law of partnership and so far as applicable must govern the contract of the parties. In passing it might be observed that but for the existence of the Uniform Partnership Act the conten-

tion that petitioners were general partners because of the authority of the special partners and the provision for control of the business through the auditors might be quite as potent as the argument respondents now urge.

The parties' rights and their liabilities are fixed by the terms of the Uniform Partnership Act, however, and our inquiry must be directed to the effect of the Act upon the agreement, and this in turn becomes a question of statutory construction.

Unquestionably it was the intention of the legislature to enlarge the usefulness of the limited partnership as an instrument in the conduct of business. To accomplish this intention, then, courts should give the Act a liberal construction.

It is equally certain that, because of the danger of great loss through its use in certain fields of industry, the legislature denied its use to those who wished to engage in the banking, insurance, railroad or brokerage business. This manifest intent, clearly expressed in section 3, must likewise find expression in the construction of the statute.

There is no authority to conduct business under the Uniform Limited Partnership Act except for the legitimate purposes therein described. Section 3 reads: "A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking, insurance, brokerage and the operation of railroads."

It is not necessary to inquire into the reasons for excepting these four businesses, but if ground for the exception in Sec. 3 be required, neither imagination nor speculation need be awakened to suggest the motive and the purpose back of the legislation. The facts in the present case furnish a most persuasive argument in favor of the wisdom of the legislation that denied to those who

would engage in the banking, the insurance, the railroad or the brokerage business the right to do so through a limited partnership.

Notwithstanding the express language of the exception in this section, the construction and the effect of which are not open to question, a conclusion has been reached that sanctions and gives legality to a course of dealing the authority for which is expressly denied.

But petitioners seek to avoid the effect of section 3 by referring to section 11 of the Act which reads, "A person who has contributed to the capital of a business conducted by a person or partnership erroneously believing that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income."

Passing for the moment the two issues raised by respondents in reference to this section, denial of any renunciation by certain of the petitioners and failure of all of them to renounce during the life of the partnership, and taking up at once the construction and effect of this section 11, it is apparent that we are confronted with a question of statutory construction, concerning which the rules applicable are well recognized. For example, the entire Act must be read and effect given to each section, if possible. If full effect cannot be given to the language of each section, then the overlapping sections must be read together and reconciled.

The Limited Partnership Act is readily analyzed. By its first section the term, limited partnership, is defined. Section 2 provides the steps which must be taken by any

two or more persons desirous of forming a limited partnership. Section 3 defines the businesses which may be carried on by limited partnerships. The other sections deal with the rights and liabilities and powers of partners who organize under this Act.

In other words, section 11 was written with section 3 as its background. The words, "limited partnership" obviously meant a partnership organized under this Act, a partnership for the purpose of conducting a business authorized under this Act. "Limited partnership" referred to lawful associations not to those organized in defiance of the statute. The relief authorized by section 11 was limited to those cases where bona fide attempts to organize limited partnerships under the provisions of the Act had been made.

The force of this conclusion is strengthened by sections 30 and 31 of the Act. In the former section the legislature used the heading "Existing Limited Partnerships," while in section 31 a further reference is made to "existing limited partnerships." "Limited partnerships" as distinguishd from "existing limited partnerships" must refer to those organized under this Act. We can hardly attribute to the legislature an attempt to give the same term different meanings in the same act.

Again speaking of the partnership the legislature in section 11 referred to "the partnership carrying on the business," etc. What business could the legislature have referred to other than a lawful business, a business for the conduct of which a partnership could be lawfully organized.

In this same section 11 we find a reference to "the rights of a limited partner." Section 10, the preceding section, is entitled "Rights of a Limited Partner." Can it be that the legislature was at one moment referring to limited partnerships organized under and by virtue of

this Act and to the rights and liabilities of limited partners as defined by this Act, and was in the same sentence including limited partnerships organized in defiance of the Act?

Moreover, there could be no erroneous belief that the Uniform Limited Partnership Act had been complied with, for the parties were not only ignorant of the existence of the law, but in their agreement they expressly stated that they were endeavoring to organize under the law of 1874, which was expressly repealed by the later enactment.

Reference to the General Partnership Act cannot in my opinion help the petitioners. It is true that section 7 of the Partnership Act provides that "Persons who are not partners as to each other are not partners as to third persons," but section 6 of the same act also provides "This act shall apply to limited partnerships, except in so far as the statutes relating to such partnerships are inconsistent herewith." Section 3 of the Limited Partnership Act necessarily destroys the test applied by section 7 of the General Partnership Act in so far as it deals with those engaged in the brokerage business. A general partnership is defined by the Act as "an association of two or more persons to carry on as co-owners a business for profit." Since two or more persons cannot conduct the brokerage business through a limited partnership, it follows that when such persons engage in the brokerage business as co-owners for profit they are necessarily general partners.

But, could I agree that section 11 applied to limited partnerships organized under these circumstances and for a purpose forbidden by the Act, I would still find myself unable to agree that as to all petitioners there was a renunciation such as is required by section 6 to relieve them of the liability of general partners.

To renounce means "to reject deliberately, to disown, to disavow, to disclaim." Ordinarily it involves personal action knowingly done, or, to quote from Black's Law Dictionary," "it implies an affirmative act of disclaimer or disavowal."

In the present case Hecht and Finn, after adjudication in bankruptcy and with enormous liability as general partners facing themselves and others, attempted to repay to the partnership the profits previously drawn by the petitioners. As to the petitioners other than Hecht and Finn such repayment could not be a renunciation unless such parties either ratified or authorized such repayment. The record shows that the petitioners other than Hecht and Finn not only failed to ratify or authorize such repayment, but when requested to do so and prior to such tender refused to authorize Hecht and Finn to make any such payment for them or to be bound by the trustees' action in case such repayment was made.

The evidence on this issue is clear and unequivocal, but if it were doubtful or uncertain, we would, on this petition to review and revise, be required to assume that petitioners other than Hecht and Finn did not renounce their interest in the profits promptly after discovering they were not limited partners.

It is not necessary in this dissenting opinion to consider the status of Clement Studebaker, Jr. and George M. Studebaker. Their position is somewhat different from that of the other petitioners. Whether that difference would be sufficient to relieve them from the liability of general partnerships, I need not discuss. Since this is a minority opinion and since the majority of the court are of the opinion that none of the petitioners were general partners, it is not necessary to consider or discuss the evidence which furnishes the basis for the contention that these two petitioners were not general partners with Marcuse and Morris.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1923.

No. 59

IN THE MATTER OF MARCUSE & COMPANY,
ALLEGED BANKRUPTS.

C. B. GILES, ET AL.,
Petitioners,

vs.

HENRY VETTE, ET AL.,
Respondents.

APPENDICES TO BRIEF AND ARGUMENT FOR EXECUTORS OF FRANK A. HECHT AND JOSEPH M. FINN, RESPONDENTS.

Containing

ILLINOIS LIMITED PARTNERSHIP ACT OF 1874.
ILLINOIS LIMITED PARTNERSHIP ACT OF 1917.
ILLINOIS GENERAL PARTNERSHIP ACT OF 1917.

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GUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

INDEX TO APPENDICES.

APPENDIX A.

LIMITED PARTNERSHIPS.

[ACT OF 1874.]

AN *Act to revise the law in relation to limited partnerships.* (Approved March 18, 1874. In force July 1, 1874.) [Hurd's Rev. Stat. Ill. 1915-16, Ch. 84.]

§ 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* That hereafter it shall be lawful to form limited partnerships within this state, according to the provisions of this act.

§ 2. Limited partnerships may consist of one or more persons, who shall be called general partners, and who shall be jointly and severally responsible, as general partners now are by law, and of one or more persons who shall contribute a specific amount of capital, in cash, or other property at cash value, to the common stock, who shall be special partners, and who shall not be liable for the debts of the partnership beyond the amount of the fund so contributed by them, respectively, to the capital stock, except as hereinafter provided.

§ 3. The general partners, only, shall be authorized to transact business, to sign for the partnership, and to bind the same.

§ 4. The persons desirous of forming such partnership shall make and severally sign a certificate, which shall contain:

1. The name or firm under which the partnership is to be conducted.

2. The general nature of the business to be transacted.

3. The names of the general and special partners therein, distinguishing which are general and which are special partners, and their respective places of residence.

4. The amount of capital stock which each special partner shall have contributed to the common stock.

5. The period at which the partnership is to commence, and the period when it will terminate.

6. They may also, if they shall elect, provide in the certificate the terms upon which the partnership may be dissolved, and may provide that the same shall not be dissolved by the death of any of the partners.

§ 5. Such certificate shall be acknowledged by the several persons signing the same, before some officer authorized by law to take the acknowledgment of deeds; and such acknowledgment shall be made and certified in the manner provided by law for the acknowledgment of deeds for the conveyance of land.

§ 6. The certificate, so acknowledged and certified, shall be filed in the office of the clerk of the county in which the principal place of business shall be situated, and shall be recorded at large by the clerk, in a book to be kept by him; and such book shall be subject, at all reasonable hours, to the inspection of all persons who may choose to inspect the same. If the partnership shall have places of business situated in different counties, a transcript of such certificate, and of the acknowledgment thereof, duly certified by the clerk in whose office it shall have been filed, under his official seal, shall be filed and recorded, in like manner, in the office of the clerk of every such county; and the books containing such records shall be subject to inspection, in the manner above directed.

§ 7. At the time of filing the original certificate, as before directed, an affidavit of one or more of the general partners shall also be filed in the same office, stating that the amount in money, or other property at cash value, specified in the certificate to have been contributed by each of the special partners to the common stock, has been, actually and in good faith, contributed and applied to the same.

§ 8. No such partnership shall be deemed to have been formed until such certificate, acknowledgment and affidavit shall have been filed, as above directed; and if any false statement shall be made in such certificate or

affidavit, all the persons interested in such partnership shall be liable for all the engagements thereof, as general partners.

§ 9. The partners shall publish the terms of partnership, when recorded, for at least six weeks, unless the partnership be sooner dissolved, immediately after recording the same, in some newspaper, such newspaper to be one printed and of general circulation in the county in which the business is to be carried on, or if no such newspaper is published in such county then in the county nearest thereto in which a newspaper shall be published; and if publication be not made, as herein provided, the partnership shall be deemed general.

§ 10. Affidavits of publication of such notices by the printer or publisher of the newspaper in which the same has been published, may be filed with the clerk directing the same, and shall be evidence of the fact therein contained.

§ 11. Upon the renewal or continuance of a limited partnership beyond the time for which it was first created, a certificate shall be made, acknowledged, recorded and published, in like maner as is provided in this act for the formation of limited partnerships; and the affidavit of one or more of the general partners, as above provided, shall also be filed with the proper county clerk, as aforesaid. And every such partnership which shall not be renewed or continued in conformity with the provisions of this section, shall be deemed a general partnership.

§ 12. No dissolution of a limited partnership shall take place, except by operation of law, before the time specified in the certificate before mentioned, unless a notice of such dissolution shall be recorded in the registry in which such certificate was recorded, and in every other registry where a copy of such certificate was recorded, and unless such notice shall also be published six weeks, successively, in some newspaper printed in the county where the certificate of the formation of such partnership was recorded; and if no newspaper shall, at the time of such dissolution, be printed in such county, then the said notice of such dissolution shall be published in some newspaper printed in an adjoining county.

§ 13. The articles of co-partnership may provide what, in case of the decease of any of the general partners, shall be the relative rights of the heirs and legal representatives of the general partners, respectively,

upon what contingency the death of any of the general partners shall operate as a dissolution of the partnership, and how and in what manner the business of such partnership shall be carried on in case of the decease of any of the general partners, and such agreement shall be binding upon all the parties to such partnerships, their heirs and legal representatives.

§ 14. When it is provided in the articles of co-partnership and said certificate that the death of a general or special partner shall not work a dissolution of the firm, the surviving general partner shall continue the business for the time provided for in the certificate, and in the manner provided in the articles of co-partnership: *Provided*, that the heirs and legal representatives of a deceased general partner, unless otherwise provided in the articles of co-partnership, or otherwise agreed upon between them and the surviving partners, shall stand in the same relation to the partnership as a special partner, subject to no greater liabilities and entitled to the same relative rights.

§ 15. Nothing in this act contained shall be so construed as to prevent the dissolution of any limited partnership at any time, on account of the fraud or misbehavior of any partner, nor to prevent the compelling of an account of the partnership business, or the protecting of the rights of any parties interested in any court of competent jurisdiction.

§ 16. The business of the partnership shall be conducted under a firm, in which the names of the general partners only shall be inserted, and if the name of any special partner shall be used in such firm with his privity, he shall be deemed a general partner.

§ 17. All suits respecting the business of such partnership shall be prosecuted by and against the general partners only, except in those cases in which provision is made in this act that the special partnership may be deemed a general partnership, in which cases all the partners deemed general partners may join or be joined in such suit; and excepting, also, those cases where special partners shall be held severally responsible, on account of any sum by them received or withdrawn from the common stock, as herein provided.

§ 18. No part of the sum which any special partner has contributed to the capital stock shall be withdrawn or paid to him in the shape of loans, dividends, profits or

otherwise, at any time during the continuance of the partnership; but any partner may, annually, receive lawful interest on the sum so contributed by him or profits actually accrued, if the payment of such interest or profits does not reduce the original amount of his capital. If it appear that, by the payment of any such interest or profits to any special partner, the original capital has been reduced, the partner receiving the same is bound to restore the amount necessary to make good his share of the capital stock without interest.

§ 19. A special partner may, from time to time, examine into the state and progress of the partnership concerns, may advise as to their management, and act as attorney in fact, but shall not transact any other business nor be employed for that purpose as agent or otherwise, without the express assent of all the general partners, and if he interfere contrary to the provisions of this section he shall be deemed a general partner.

§ 20. The general partners in every such partnership shall be liable to account to the special partners, and to each other, for the management of the concern, both in law and equity, as other partners.

§ 21. Every partner who shall be guilty of any fraud in the affairs of the partnership shall be liable civilly to the party injured to the extent of his damage, and shall also be liable to an indictment for a misdemeanor and punished by fine or imprisonment, or both, in the discretion of the court.

§ 22. It shall not be lawful for any such partnership, nor any member thereof, in contemplation of bankruptcy or insolvency, and with the intention and for the purpose of paying or securing any one or more of their creditors in preference to any other of their creditors, to make any sale, conveyance, gift, transfer or assignment of their property or effects, or to confess any judgment, or to create any lien whatsoever upon their property or effects; and every such conveyance, gift, transfer or assignment involving such judgment or other lien, shall be and the same is hereby declared to be utterly void.

§ 23. In case of bankruptcy or insolvency of partnership, no special partner shall be considered or allowed to claim as a creditor under any circumstances, except for money loaned by him to such partnership, until the claims of all the other creditors of the partnership shall be satisfied.

APPENDIX B.

LIMITED PARTNERSHIPS.

[ACT OF 1917.]

(HOUSE BILL NO. 303. FILED JUNE 28, 1917.) [Laws 1917, p. 569; Hurd's Rev. Stat. Ill., 1917, Ch. 106, §§45-75.]

AN ACT *to make uniform the law relating to limited partnerships.*

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* A limited partnership is a partnership formed by two or more persons under the provisions of section 2, having as members one or more general partners and one or more limited partners. The limited partners as such shall not be bound by the obligations of the partnership.

§ 2. FORMATION.] (1) Two or more persons desiring to form a limited partnership shall

(a) Sign and swear to a certificate, which shall state

I. The name of the partnership,

II. The character of the business,

III. The location of the principal place of business,

IV. The name and place of residence of each member; general and limited partners being respectively designated,

V. The term for which the partnership is to exist,

VI. The amount of cash and a description of and the agreed value of the other property contributed by each limited partner,

VII. The additional contributions, if any, agreed to be made by each limited partner and the times at which or events on the happening of which they shall be made,

VIII. The time, if agreed upon, when the contribution of each limited partner is to be returned,

IX. The share of the profits or the other compensation by way of income which each limited partner shall receive by reason of his contribution,

X. The right, if given, of a limited partner to substitute an assignee as contributor in his place, and the terms and conditions of the substitution,

XI. The right, if given, of the partners to admit additional limited partners,

XII. The right, if given, of one or more of the limited partners to priority over other limited partners, as to contributions or as to compensation by way of income, and the nature of such priority,

XIII. The right, if given, of the remaining general partner or partners to continue the business on the death, retirement or insanity of a general partner, and

XIV. The right, if given, of a limited partner to demand and receive property other than cash in return for his contribution.

(b) File for record the certificate in the office of the recorder of deeds of the county where the principal office of such limited partnership is located.

(2) A limited partnership is formed if there has been substantial compliance in good faith with the requirements of paragraph (1).

§ 3. A limited partnership may carry on any business which a partnership without limited partners may carry on, except banking, insurance, brokerage and the operation of railroads.

§ 4. The contributions of a limited partner may be cash or other property, but not services.

§ 5. (1) The surname of a limited partner shall not appear in the partnership name, unless

(a) It is also the surname of a general partner, or

(b) Prior to the time when the limited partner became such the business had been carried on under a name in which his surname appeared.

(2) A limited partner whose name appears in a partnership name contrary to the provisions of paragraph (1) is liable as a general partner to partnership creditors who extend credit to the partnership without actual knowledge that he is not a general partner.

§ 6. If the certificate contains a false statement, one who suffers loss by reliance on such statement may hold liable any party to the certificate who knew the statement to be false

(a) At the time he signed the certificate, or

(b) Subsequently, but within a sufficient time before the statement was relied upon to enable him to cancel or amend the certificate, or to file a petition for its cancellation or amendment as provided in section 25 (3).

§ 7. A limited partner shall not become liable as a general partner unless, in addition to the exercise of his rights and powers as a limited partner, he takes part in the control of the business.

§ 8. After the formation of a limited partnership, additional limited partners may be admitted upon filing an amendment to the original certificate in accordance with the requirements of section 25.

§ 9. (1) A general partner shall have all the rights and powers and be subject to all the restrictions and liabilities of a partner in a partnership without limited partners, except that without the written consent or ratification of the specific act by all the limited partners, a general partner or all of the general partners have no authority to

(a) Do any act in contravention of the certificate,

(b) Do any act which would make it impossible to carry on the ordinary business of the partnership,

(c) Confess a judgment against the partnership,

(d) Possess partnership property, or assign their rights in specific partnership property, for other than a partnership purpose,

(e) Admit a person as a general partner,

(f) Admit a person as a limited partner, unless the right so to do is given in the certificate,

(g) Continue the business with partnership property on the death, retirement or insanity of a general partner, unless the right so to do is given in the certificate.

§ 10. RIGHTS OF A LIMITED PARTNER.] (1) A limited partner shall have the same rights as a general partner to

(a) Have the partnership books kept at the principal place of business of the partnership, and at all times to inspect and copy any of them,

(b) Have on demand true and full information of all things affecting the partnership, and a formal account of partnership affairs whenever circumstances render it just and reasonable, and

(c) Have dissolution and winding up by decree of court.

(2) A limited partner shall have the right to receive a share of the profits or other compensation by way of income, and to the return of his contribution as provided in sections 15 and 16—

§ 11—A person who has contributed to the capital of a business conducted by a person or partnership erroneously beleiving [believing] that he has become a limited partner in a limited partnership, is not, by reason of his exercise of the rights of a limited partner, a general partner with the person or in the partnership carrying on the business, or bound by the obligations of such person or partnership; provided that on ascertaining the mistake he promptly renounces his interest in the profits of the business, or other compensation by way of income.

§ 12. ONE PERSON BOTH GENERAL AND LIMITED PARTNER.] (1) A person may be a general partner and a limited partner in the same partnership at the same time.

(2) A person who is a general, and also at the same time a limited partner, shall have all the rights and powers and be subject to all the restrictions of a general partner; except that, in respect to his contribution, he shall have the rights against the other members which he would have had if he were not also a general partner.

§ 13—Loans and other business transactions with limited partner.] (1) A limited partner also may loan money to and transact other business with the partnership, and, unless he is also a general partner, receive on account of resulting claims against the partnership, with general creditors, a *pro rata* share of the assets. No limited partner shall in respect to any such claim

(a) Receive or hold as collateral security any partnership property, or

(b) Receive from a general partner or the partnership any payment, conveyance, or release from liability, if at the time the assets of the partnership are not sufficient to discharge partnership liabilities to persons not claiming as general or limited partners.

(2) The receiving of collateral security, or a payment, conveyance, or release in violation of the provisions of paragraph (1) is a fraud on the creditors of the partnership.

§ 14. Relation of limited partners inter se.] Where there are several limited partners the members may agree that one or more of the limited partners shall have a priority over other limited partners as to the return of their contributions, as to their compensation by way of income, or as to any other matter. If such an agreement is made it shall be stated in the certificate, and in the absence of such a statement all the limited partners shall stand upon equal footing.

§ 15. Compensation of limited partners.] A limited partner may receive from the partnership the share of the profits or the compensation by way of income stipulated for in the certificate; *provided*, that after such payment is made, whether from the property of the partnership or that of a general partner, the partnership assets are in excess of all liabilities of the partnership except liabilities to limited partners on account of their contributions and to general partners.

§ 16—Withdrawal or reduction of limited partner's contribution.] (1) A limited partner shall not receive from a general partner or out of partnership property any part of his contribution until

(a) All liabilities of the partnership, except liabilities to general partners and to limited partners on account of their contributions, have been paid or there remains property of the partnership sufficient to pay them,

(b) The consent of all members is had, unless the return of the contribution may be rightfully demanded under the provisions of paragraph (2), and

(c) The certificate is cancelled or so amended as to set forth the withdrawal or reduction.

(2) Subject to the provisions of paragraph (1) a limited partner may rightfully demand the return of his contribution

(a) On the dissolution of a partnership, or

(b) When the date specified in the certificate for its return has arrived, or

(c) After he has given six months' notice in writing to all other members, if no time is specified in the certificate either for the return of the contribution or for the dissolution of the partnership.

(3) In the absence of any statement in the certificate to the contrary or the consent of all members, a limited partner, irrespective of the nature of his contribution, has only the right to demand and receive cash in return for his contribution.

(4) A limited partner may have the partnership dissolved and its affairs wound up when

(a) He rightfully but unseccessfully [unsuccessfully] demands the return of his contribution, or

(b) The other liabilities of the partnership have not been paid, or the partnership property is insufficient for their payment as required by paragraph

(1a) And the limited partner would otherwise be entitled to the return of his contribution.

§ 17. LIABILITY OF LIMITED PARTNER TO PARTNERSHIP.] (1) A limited partner is liable to the partnership

(a) For the difference between his contribution as actually made and that stated in the certificate as having been made, and

(b) For any unpaid contribution which he agreed in the certificate to make in the future at the time and on the conditions stated in the certificate.

(2) A limited partner holds as trustee for the partnership

(a) Specific property stated in the certificate as contributed by him, but which was not contributed or which has been wrongfully returned, and

(b) Money or other property wrongfully paid or conveyed to him on account of his contribution.

(3) The liabilities of a limited partner as set forth in this section can be waived or compromised only by the consent of all members; but a waiver or compromise shall not affect the right of a creditor of a partnership who extended credit or whose claim arose after the filing and before a cancellation or amendment of the certificate, to enforce such liabilities.

(4) When a contributor has rightfully received the return in whole or in part of the capital of his contribution, he is nevertheless liable to the partnership for any sum, not in excess of such return with interest, necessary to discharge its liabilities to all creditors who extended credit or whose claims arose before such return.

§ 18—NATURE OF LIMITED PARTNER'S INTEREST IN PARTNERSHIP.] A limited partner's interest in the partnership is personal property.

§ 19. ASSIGNMENT OF LIMITED PARTNER'S INTEREST.] (1) A limited partner's interest is assignable.

(2) A substituted limited partner is a person admitted to all the rights of a limited partner who has died or has assigned his interest in a partnership.

(3) An assignee, who does not become a substituted limited partner, has no right to require any information or account of the partnership transactions or to inspect the partnership books; he is only entitled to receive the share of the profits or other compensation by way of income, or the return of his contribution, to which his assignor would otherwise be entitled.

(4) An assignee shall have the right to become a substantial limited partner if all the members (except the assignor) consent thereto or if the assignor, being thereunto empowered by the certificate, gives the assignee that right.

(5) An assignee becomes a substituted limited partner when the certificate is appropriately amended in accordance with section 25.

(6) The substituted limited partner has all the rights and powers, and is subject to all the restrictions and liabilities of his assignor, except those liabilities of which he was ignorant at the time he became a limited partner and which could not be ascertained from the certificate.

(7) The substitution of the assignee as a limited part-

ner does not release the assignor from liability to the partnership under sections 6 and 17.

§ 20. EFFECT OF RETIREMENT, DEATH OR INSANITY OF A GENERAL PARTNER.] The retirement, death or insanity of a general partner dissolves the partnership, unless the business is continued by the remaining general partners

(a) Under a right so to do stated in the certificate, or

(b) With the consent of all members.

§ 21. DEATH OF LIMITED PARTNER.] (1) On the death of a limited partner his executor or administrator shall have all the rights of a limited partner for the purpose of settling his estate, and such power as the deceased had to constitute his assignee a substituted limited partner.

(2) The estate of a deceased limited partner shall be liable for all his liabilities as a limited partner.

§ 22. RIGHTS OF CREDITORS OF LIMITED PARTNERS.] (1) On due application to a court of competent jurisdiction by any judgment creditor of a limited partner, the court may charge the interest of the indebted limited partner with payment of the unsatisfied amount of the judgment debt; and may appoint a receiver, and make all other orders, directions, and inquiries which the circumstances of the case may require.

(2) The interest may be redeemed with the seperate [separate] property of any general partner, but may not be redeemed with partnership property.

(3) The remedies conferred by paragraph (1) shall not be deemed exclusive of others which may exist.

(4) Nothing in this Act shall be held to deprive a limited partner of his statutory exemption.

§ 23. DISTRIBUTION OF ASSETS.] (1) In settling accounts after dissolution the liabilities of the partnership shall be entitled to payment in the following order;

(a) Those to creditors, in the order of priority as provided by law, except those to limited partners on account of their contributions, and to general partners,

(b) Those to limited partners in respect to their share of the profits and other compensation by way of income on their contributions,

(c) Those to limited partners in respect to the capital of their contributions,

(d) Those to general partners other than for capital and profits,

(e) Those to general partners in respect to profits,

(f) Those to general partners in respect to capital.

(2) Subject to any statement in the certificate or to subsequent agreement, limited partners share in the partnership assets in respect to their claims for capital and in respect to their claims for profits or for compensation by way of income on their contributions respectively, in proportion to the respective amounts of such claims.

§ 24. WHEN CERTIFICATE SHALL BE CANCELLED OR AMENDED.] (1) The certificate shall be cancelled when the partnership is dissolved or all limited partners cease to be such.

(2) A certificate shall be amended when

(a) There is a change in the name of the partnership or in the amount or character of the contribution of any limited partner,

(b) A person is substituted as a limited partner,

(c) An additional limited partner is admitted,

(d) A person is admitted as a general partner,

(e) A general partner retires, dies, or becomes insane, and the business is continued under section 20,

(f) There is a change in the character of the business of the partnership,

(g) There is a false or erroneous statement in the certificate,

(h) There is a change in the time as stated in the certificate for the dissolution of the partnership or for the return of a contribution,

(i) A time is fixed for the dissolution of the partnership, or the return of a contribution, no time having been specified in the certificate, or

(j) The members desire to make a change in any other statement in the certificate in order that it shall accurately represent the agreement between them.

§ 25. REQUIREMENTS FOR AMENDMENT AND FOR CANCELLATION OF CERTIFICATE.] (1) The writing to amend a certificate shall

(a) Conform to the requirements of section 2

(1a) as far as necessary to set forth clearly the change in the certificate which it is desired to make, and

(b) Be signed and sworn to by all members and an

amendment substituting a limited partner or adding a limited or a general partner shall be signed also by the member to be substituted or added, and when a limited partner is to be substituted, the amendment shall also be signed by the assigning limited partner.

(2) The writing to cancel a certificate shall be signed by all members.

(3) A person desiring the cancellation or amendment of a certificate, if any person designated in paragraphs (1) and (2) as a person who must execute the writing refuses to do so, may petition the (here designate the proper court) to direct a cancellation or amendment thereof.

(4) If the court finds that the petitioner has a right to have the writing executed by a person who refuses to do so, it shall order the recorder of deeds in the office where the certificate is recorded to record the cancellation or amendment of the certificate; and where the certificate is to be amended, the court shall also cause to be filed for record in said office a certified copy of its decree setting forth the amendment.

(5) A certificate is amended or canceled [cancelled] when there is filed for record in the office (here designate the office designated in section 2) where the certificate is recorded.

(a) A writing in accordance with the provisions of paragraph (1) or (2) or

(b) A certified copy of the order of court in accordance with the provisions of paragraph (4).

(6) After the certificate is duly amended in accordance with this section, the amended certificate shall thereafter be for all purposes the certificate provided for by this Act.

§ 26. PARTIES TO ACTIONS.] A contributor, unless he is a general partner, is not a proper party to proceedings by or against a partnership, except where the object is to enforce a limited partner's right against or liability to the partnership.

§ 27. NANE [NAME] OF ACT.] This Act may be cited as the Uniform Limited Partnership Act.

§ 28. RULES OF CONSTRUCTION.] (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Act.

(2) This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(3) This Act shall not be so construed as to impair the obligations of any contract existing when the Act goes into effect, nor to affect any action or proceedings begun or right accrued before this Act takes effect.

§ 29. RULES FOR CASES NOT PROVIDED FOR IN THIS ACT.] In any case not provided for in this Act the rules of law and equity, including the law merchant, shall govern.

§ 30. PROVISIONS FOR EXISTING LIMITED PARTNERSHIP.] (1) A limited partnership formed under any statute of this State prior to the adoption of this Act, may become a limited partnership under this Act by complying with the provisions of section 2; *provided* the certificate sets forth

(a) The amount of the original contribution of each limited partner, and the time when the contribution was made, and

(b) That the property of the partnership exceeds the amount sufficient to discharge its liabilities to persons not claiming as general or limited partners by an amount greater than the sum of the contributions of its limited partners.

(2) A limited partnership formed under any statute of this State prior to the adoption of this Act, until or unless it becomes a limited partnership under this Act, shall continue to be governed by the provisions of an Act entitled, "An Act to revise the law in relation to limited partnerships," approved March 18, 1874, in force July 1, 1874, except that such partnership shall not be renewed unless so provided in the original agreement.

§ 31. ACT (ACTS) REPEALED.] Except as affecting existing limited partnerships to the extent set forth in section 30, the Act entitled "An Act to revise the law in relation to limited partnerships," approved March 18, 1874, in force July 1, 1874, is hereby repealed.

FILED June 28, 1917.

This bill having remained with the Governor ten days, Sundays excepted, the General Assembly being in session, it has thereby become a law.

Witness my hand this twenty-eighth day of June, A. D. 1917.

LOUIS L. EMMERSON, *Secretary of State.*

APPENDIX C.

PARTNERSHIPS.

UNIFORM ACT [1917].

(HOUSE BILL No. 302. FILED JUNE 28, 1917.) [Laws 1917, p. 624; Hurd's Rev. Stat. Ill. 1917, Ch. 1060, §§1-44.]

AN ACT *relating to partnerships and promote uniformity in the law with reference thereto.*

PART I.

PRELIMINARY PROVISIONS.

SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly:* This Act may be cited as Uniform Partnership Act.

§ 2. In this Act "court" includes every court and judge having jurisdiction in the case.

"Business" includes every trade, occupation or profession.

"Person" includes individuals, partnerships, corporations, and other associations.

"Bankrupt" includes bankrupt under the Federal Bankruptcy Act or insolvent under any State insolvent Act.

"Conveyance" includes every assignment, lease, mortgage, or encumbrance.

"Real property" includes land and any interest or estate in land.

§ 3. (1) A person has "knowledge" of a fact within the meaning of this Act not only when he has actual knowledge thereof, but also when he has knowledge of such other facts as in the circumstances shows bad faith.

(2) A person has "notice" of a fact within the meaning of this Act when the person who claims the benefit of the notice

(*a*) States the fact to such person, or

(*b*) Delivers through the mail, or by other means of communication, a written statement of the fact to such person or to a proper person at his place of business or residence.

§ 4. (1) The rule that statutes in derogation of the common law are to be strictly construed shall have no application to this Act.

(2) The law of estoppel shall apply under this Act.

(3) The law of agency shall apply under this Act.

(4) This Act shall be so interpreted and construed as to effect its general purpose to make uniform the law of those states which enact it.

(5) This Act shall not be construed so as to impair

the obligations of any contract existing when the Act goes into effect, nor to affect any action or proceedings begun or right accrued before this Act takes effect.

§ 5. In any case not provided for in this Act the rules of law and equity, including the law merchant, shall govern.

Part II.

NATURE OF A PARTNERSHIP.

§ 6. (1) A partnership is an association of two or more persons to carry on as co-owners a business for profit.

(2) But any association formed under any other statute of this State, or any statute adopted by authority, other than the authority of this State, is not a partnership under this Act, unless such association would have been a partnership in this State prior to the adoption of this Act; but this Act shall apply to limited partnerships except in so far as the statutes relating to such partnerships are inconsistent herewith.

§ 7. In determining whether a partnership exists, these rules shall apply:

(1) Except as provided by section 16, persons who are not partners as to each other are not partners as to third persons.

(2) Joint tenancy, tenancy in common, tenancy by the entireties, joint property, common property, or part ownership does not of itself establish a partnership, whether such co-owners do or do not share any profits made by the use of the property.

(3) The sharing of gross returns does not of itself establish a partnership, whether or not the persons sharing them have a joint or common right or interest in any property from which the returns are derived.

(4) The receipt by a person of a share of the profits of a business is *prima facie* evidence that he is a partner in the business, but no such inference shall be drawn if such profits were received in payment:

(*a*) As a debt by installments or otherwise;

(*b*) As wages of an employee or rent to a landlord;

(*c*) As an annuity to a widow or representative of a deceased partner;

(*d*) As interest on a loan, though the amount of payment vary with the profits of the business;

(*e*) As the consideration for the sale of the good-will of a business or other property by installments or otherwise.

§ 8. PARTNERSHIP PROPERTY.] (1) All property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise, on account of the partnership is partnership property.

(2) Unless the contrary intention appears, property acquired with partnership funds is partnership property.

(3) Any estate in real property may be acquired in the partnership name. Title so acquired can be conveyed only in the partnership name.

(4) A conveyance to a partnership in the partnership name, though without words of inheritance, passes the entire estate of the grantor unless a contrary intent appears.

PART III.

RELATIONS OF PARTNERS TO PERSONS DEALING WITH THE PARTNERSHIP.

§ 9. (1) Every partner is an agent of the partnership for the purpose of its business, and the act of every partner, including the execution in the partnership name of any instrument, for apparently carrying on in the usual way the business of the partnership of which he is a member binds the partnership, unless the partner so acting has in fact no authority to act for the partnership in the particular matter, and the person with whom he is dealing has knowledge of the fact that he has no such authority.

(2) An Act of a partner which is not apparently for the carrying on of the business of the partnership in the usual way does not bind the partnership unless authorized by the other partners.

(3) Unless authorized by the other partners or unless they have abandoned the business, one or more but less than all the partners have no authority to:

(*a*) Assign the partnership property in trust for creditors or on the assignee's promise to pay the debts of the partnership;

(*b*) Dispose of the good-will of the business;

(*c*) Do any other act which would make it impossible to carry on the ordinary business of the partnership;

(*d*) Confess a judgment;

(*e*) Submit a partnership claim or liability to arbitration or reference.

(4) No act of a partner in contravention of a restriction on his authority shall bind the partnership to persons having knowledge of the restriction.

§ 10. (1) Where title to real property is in the partnership name, any partner may convey title to such property by a conveyance executed in the partnership name; but the partnership may recover such property unless the partner's act binds the partnership under the provisions of paragraph (1) of section 9, or unless such property has been conveyed by the grantee or a person claiming through such grantee to a holder for value without knowledge that the partner, in making the conveyance, has exceeded his authority.

(2) Where title to real property is in the name of the partnership, a conveyance executed by a partner, in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(3) Where title to real property is in the name of one or more but not all the partners, and the record does not disclose the right of the partnership, the partners in whose name the title stands may convey title to such property, but the partnership may recover such property if the partners' act does not bind the partnership under the provisions of paragraph (1) of section 9, unless the purchaser or his assignee, is a holder for value, without knowledge.

(4) Where the title to real property is in the name of one or more or all the partners, or in a third person in trust for the partnership, a conveyance executed by a partner in the partnership name, or in his own name, passes the equitable interest of the partnership, provided the act is one within the authority of the partner under the provisions of paragraph (1) of section 9.

(5) Where the title to real property is in the names of all the partners a conveyance executed by all the partners passes all their rights in such property.

§ 11. An admission or representation made by any partner concerning partnership affairs within the scope of his authority is conferred by this Act is evidence against the partnership.

§ 12. Notice to any partner of any matter relating to partnership affairs, and the knowledge of the partner acting in the particular matter, acquired while a partner or then present to his mind, and the knowledge of any other partner who reasonably could and should have communicated it to the acting partner, operate as notice to or knowledge of the partnership, except in the case of a fraud on the partnership committed by or with the consent of that partner.

§ 13. Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the partnership, or with the authority of his co-partners, loss or injury is caused to any person, not being a partner in the partnership, or any penalty is incurred, the partnership is liable therefor to the same extent as the partner so acting or omitting to act.

§ 14. The partnership is bound to make good the loss:

(*a*) Where one partner acting within the scope of his apparent authority receives money or property of a third person and misapplies it; and

(*b*) Where the partnership in the course of its business receives money or property of a third person and the money or property so received is misapplied by any partner while it is in the custody of the partnership.

§ 15. All partners are liable

(*a*) Jointly and severally for everything chargeable to the partnership under sections 13 and 14.

(*b*) Jointly for all other debts and obligations of the partnership; but any partner may enter into a separate obligation to perform a partnership contract.

§ 16. (1) When a person, by words spoken or written or by conduct, represents himself, or consents to another representing him to any one, as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the actual or apparent partnership, and if he has made such representation or consented to its being made in a public manner he is liable to such person, whether the representation

has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(*a*) When a partnership liability results, he is liable as though he were an actual member of the partnership.

(*b*) When no partnership liability results, he is liable jointly with the other persons, if any, so consenting to the contract or representation as to incur liability, otherwise separately.

(2) When a person has been thus represented to be a partner in an existing partnership, or with one or more persons not actual partners, he is an agent of the persons consenting to such representation to bind them to the same extent and in the same manner as though he were a partner in fact, with respect to persons who rely upon the representation. Where all the members of the existing partnership consent to the representation, a partnership act or obligation results; but in all other cases it is the joint act or obligation of the person acting and the persons consenting to the representation.

§ 17. A person admitted as a partner into an existing partnership is liable for all the obligations of the partnership arising before his admission as though he had been a partner when such obligations were incurred, except that this liability shall be satisfied only out of partnership property.

Part IV.

Relations of Partners to One Another.

§ 18. The rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by the following rules:

(*a*) Each partner shall be repaid his contribution, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits.

(*b*) The partnership must indemnify every partner in

respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property.

(*c*) A partner, who in aid of the partnership makes any payment or advance beyond the amount of capital which he agreed to contribute, shall be paid interest from the date of the payment or advance.

(*d*) A partner shall receive interest on the capital contributed by him only from the date when repayment should be made.

(*e*) All partners have equal rights in the management and conduct of the partnership business.

(*f*) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs.

(*g*) No person can become a member of a partnership without the consent of all the partners.

(*h*) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners; but no act in contravention of any agreement between the partners may be done rightfully without the consent of all the partners.

§ 19. The partnership books shall be kept, subject to any agreement between the partners, at the principal place of business of the partnership, and every partner shall at all times have access to and may inspect and copy any of them.

§ 20. Partners shall render on demand true and full information of all things affecting the partnership to any partner or the legal representative of any deceased partner or partner under legal disability.

§ 21. (1) Every partner must account to the partnership for any benefit, and hold as trustee for it any profits derived by him without the consent of the other partners from any transaction connected with the formation, conduct, or liquidation of the partnership or from any use by him of its property.

(2) This section applies also to the representatives of a deceased partner engaged in the liquidation of the affairs of the partnership as the personal representatives of the last surviving partner.

§ 22. Any partner shall have the right to a formal account as to partnership affairs:

(*a*) If he is wrongfully excluded from the partnership business or possession of its property by his co-partners,

(*b*) If the right exists under the terms of any agreement,

(*c*) As provided by section 21.

(*d*) Whenever other circumstances render it just and reasonable.

§ 23. (1) When a partnership for a fixed term or particular undertaking is continued after the termination of such term or particular undertaking without any express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will.

(2) A continuation of the business by the partners or such of them as habitually acted therein during the term, without any settlement or liquidation of the partnership affairs, is *prima facie* evidence of a continuation of the partnership.

Part V.

PROPERTY RIGHTS OF A PARTNER.

§ 24. The property rights of a partner are (1) his rights in specific partnership property, (2) his interest in the partnership, and (3) his right to participate in the management.

§25. (1) A partner is co-owner with his partners of a specific partnership property holding as a tenant in partnership.

(2) The incidents of this tenancy are such that:

(*a*) A partner, subject to the provisions of this Act and to any agreement between the partners, has an equal right with his partners to possess specific partnership property for partnership purposes; but he has no right to possess such property for any other purpose without the consent of his partners.

(*b*) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

(*c*) A partner's right in specific partnership property is not subject to attachment or execution, except on a claim against the partnership. When partnership property is attached for a partnership debt the partners, or any of them, or the representatives of a deceased partner, cannot claim any right under the homestead or exemption laws.

(*d*) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. Such surviving partner or partners, or the legal representative of the last surviving partner, has no right to possess the partnership property for any but a partnership purpose.

(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs, or next of kin.

§ 26. A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property.

§ 27. (1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership, nor, as against the other partners in the absence of agreement, entitle the assignee, during the continuance of the partnership, to interfere in the management or administration of the partnership business or affairs, or to require any information or account of partnership transactions, or to inspect the partnership books; but it merely entitles the assignee to receive in accordance with his contract the profits to which the assigning partner would otherwise be entitled.

(2) In case of a dissolution of the partnership, the assignee is entitled to receive his assignor's interest and may require an account from the date only of the last account agreed to by all the partners.

§ 28. (1) On due application to a competent court by any judgment creditor of a partner, the court which entered the judgment, order, or decree, or any other court, may charge the interest of the debtor partner with payment of the unsatisfied amount of such judgment debt with interest thereon; and may then or later appoint a receiver of his share of the profits, and of any other money due or to fall due to him in respect of the part-

nership, and make all other orders, directions, accounts and inquiries which the debtor partner might have made, or which the circumstances of the case may require.

(2) The interest charged may be redeemed at any time before foreclosure, or in case of a sale being directed by the court may be purchased without thereby causing a dissolution:

(a) With separate property, by any one or more of the partners, or

(b) With partnership property, by any one or more of the partners with the consent of all the partners whose interests are not so charged or sold.

(3) Nothing in this Act shall be held to deprive a partner of his right, if any, under the exemption laws, as regards his interest in the partnership.

Part VI.

DISSOLUTION AND WINDING UP.

§ 29. The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business.

§ 30. On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed.

§ 31. Dissolution is caused:

(1) Without violation of the agreement between the partners,

(a) By the termination of the definite term or particular undertaking specified in the agreement,

(b) By the express will of any partner when no definite term or particular undertaking is specified,

(c) By the express will of all the partners who have not assigned their interests or suffered them to be charged for their separate debts, either before or after the termination of any specified term or particular undertaking,

(d) By the expulsion of any partner from the business *bona fide* in accordance with such a power conferred by the agreement between the partners;

(2) In contravention of the agreement between the partners, where the circumstances do not permit a dis-

solution under any other provision of this section, by the express will of any partner at any time;

(3) By any event which makes it unlawful for the business of the partnership to be carried on or for the members to carry it on in partnership;

(4) By the death of any partner;

(5) By the bankruptcy of any partner or the partnership;

(6) By decree of court under section 32.

§ 32. (1) On application by or for a partner the court shall decree a dissolution whenever:

(a) A partner has been declared a lunatic in any judicial proceeding or is shown to be of unsound mind,

(b) A partner becomes in any other way incapable of performing his part of the partnership contract,

(c) A partner has been guilty of such conduct as tends to affect prejudicially the carrying on of the business,

(d) A partner wilfully or persistently commits a breach of the partnership or agreement, or otherwise so conducts himself in matters relating to the partnership business that it is not reasonably practicable to carry on the business in partnership with him,

(e) The business of the partnership can only be carried on at a loss.

(f) Other circumstances render a dissolution equitable.

(2) On the application of the purchaser of a partner's interest under sections 28 or 29:

(a) After the termination of the specified term or particular undertaking,

(b) At any time if the partnership was a partnership at will when the interest was assigned or when the charging order was issued.

§ 33. Except so far as may be necessary to wind up partnership affairs or to complete transactions begun but not then finished, dissolution terminates all authority of any partner to act for the partnership,

(1) With respect to the partners,

(a) When the dissolution is not by the act, bankruptcy or death of a partner; or

(b) When the dissolution is by such act, bankruptcy or death of a partner, in cases where section 34 so requires.

(2) With respect to persons not partners, as declared in section 35.

§ 34. Where the dissolution is caused by the act, death or bankruptcy of a partner, each partner is liable to his co-partners for his share of any liability created by any partner acting for the partnership as if the partnership had not been dissolved unless

(a) The dissolution being by act of any partner, the partner acting for the partnership had knowledge of the dissolution, or

(b) The dissolution being by the death or bankruptcy of a partner, the partner acting for the partnership had knowledge or notice of the death or bankruptcy.

§ 35. (1) After dissolution a partner can bind the partnership except as provided in paragraph (3)

(a) By any act appropriate for winding up partnership affairs or completing transactions unfinished at dissolution,

(b) By any transaction which would bind the partnership if dissolution had not taken place, provided the other party to the transaction

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of the dissolution; or

(II) Though he had not so extended credit, had nevertheless known of the partnership prior to dissolution, and, having no knowledge or notice of dissolution, the fact of dissolution had not been advertised in a newspaper of general circulation in the place (or in each place if more than one) at which the partnership business was regularly carried on.

(2) The liability of a partner under paragraph (1b) shall be satisfied out of partnership assets alone when such partner had been prior to dissolution

(a) Unknown as a partner to the person with whom the contract is made; and

(b) So far unknown and inactive in partnership affairs that the business reputation of the partnership could not be said to have been in any degree due to his connection with it.

(3) The partnership is in no case bound by any act of a partner after dissolution

(a) Where the partnership is dissolved because it is unlawful to carry on the business, unless the act is appropriate for winding up partnership affairs; or

(b) Where the partner has become bankrupt; or

(c) Where the partner has no authority to wind up partnership affairs, except by a transaction with one who

(I) Had extended credit to the partnership prior to dissolution and had no knowledge or notice of his want of authority; or

(II) Had not extended credit to the partnership prior to dissolution, and, having no knowledge or notice of his want of authority, the fact of his want of authority has not been advertised in the manner provided for advertising the fact of dissolution in paragraph (1b II).

(4) Nothing in this section shall affect the liability under section 16 of any person who after dissolution represents himself or consents to another representing him as a partner in a partnership engaged in carrying on business.

§ 36. (1) The dissolution of the partnership does not of itself discharge the existing liability of any partner.

(2) A partner is discharged from any existing liability upon dissolution of the partnership by an agreement to that effect between himself, the partnership creditor and the person or partnership continuing the business; and such agreement may be inferred from the course of dealing between the creditor having knowledge of the dissolution and the person or partnership continuing the business.

(3) Where a person agrees to assume the existing obligations of a dissolved partnership, the partners whose obligations have been assumed shall be discharged from any liability to any creditor of the partnership who, knowing of the agreement, consents to a material alteration in the nature or time of payment of such obligations.

(4) The individual property of a deceased partner shall be liable for all obligations of the partnership incurred while he was a partner but subject to the prior payment of his separate debts.

§ 37. Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs: *Provided, however,* that any partner, his legal representative, or his assignee, upon cause shown, may obtain winding up by the court.

§ 38. (1) When dissolution is caused in any way, except in contravention of the partnership agreement, each partner, as against his co-partners and all persons claiming through them in respect of their interests in the partnership, unless otherwise agreed, may have the partnership property applied to discharge its liabilities, and the surplus applied to pay in cash the net amount owing to the respective partners. But if dissolution is caused by expulsion of a partner, *bona fide* under the partnership agreement, and if the expelled partner is discharged from all partnership liabilities, either by payment or agreement under section 36 (2), he shall receive in cash only the net amount due him from the partnership.

(2) When dissolution is caused in contravention of the partnership agreement the rights of the partners shall be as follows:

(a) Each partner who has not caused dissolution wrongfully shall have,

I. All the rights specified in paragraph (1) of this section, and

II. The right, as against each partner who has caused the dissolution wrongfully, to damages for breach of the agreement.

(b) The partners who have not caused the dissolution wrongfully, if they all desire to continue the business in the same name, either by themselves or jointly with others, may do so, during the agreed term for the partnership and for that purpose may possess the partnership property, provided they secure the payment by bond approved by the court, or pay to any partner who has caused the dissolution wrongfully, the value of his interest in the partnership at the dissolution, less any damages recoverable under clause (2a II) of this section, and in like maner indemnify him against all present or future partnership liabilties,

(c) A partner who has caused the dissolution wrongfully shall have:

I. If the business is not continued under the provisions of paragraph (2b) all the rights of a partner under paragraph (1), subject to clause (2a II), of this section,

II. If the business is continued under paragraph (2b) of this section the right as against his co-partners and

all claiming through them in respect of their interests in the partnership, to have the value of his interest in the partnership, less any damages caused to his co-partners by the dissolution, ascertained and paid to him in cash, or the payment secured by bond approved by the court, and to be relased from all existing liabilities of the partnership; but in ascertaining the value of the partner's interest the value of the good-will of the business shall not be considered.

§ 39. Where a partnership contract is rescinded on the ground of the fraud or misrepresentation of one of the parties thereto, the party entitled to rescind is, with out prejudice to any other right, entitled,

(a) To a lien on, or right of retention of, the surplus of the partnership property after satisfying the partnership liabilities to third persons for any sum of money paid by him for the purchase of an interest in the partnership and for any capital or advances contributed by him; and

(b) To stand, after all liabilities to third persons have been satisfied, in the place of the creditors of the partnership for any payments made by him in respect of the partnership liabilities; and

(c) To be indemnified by the person guilty of the fraud or making the representation against all debts and liabilities of the partnership.

§ 40. In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

(a) The assets of the partnership are;

I. The partnership property,

II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

(b) The liabilities of the partnership shall rank in order of payment, as follows:

I. Those owing to creditors other than partners,

II. Those owing to partners other than for capital and profits,

III. Those owing to partners in respect of capital,

IV. Those owing to partners in respect of profits.

(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities.

(d) The partners shall contribute, as provided by section 18 (a) the amount necessary to satisfy the liabilities; but if any, but not all, of the partners are insolvent, or, not being subject to process, refuse to contribute, the other partners shall contribute their share of the liabilities, and, in the relative proportions in which they share the profits, the additional amount necessary to pay the liabilities.

(e) An assignee for the benefit of creditors or any person appointed by the court shall have the right to enforce the contributions specified in clause (d) of this paragraph.

(f) Any partner or his legal representative shall have the right to enforce the contributions specified in clause (d) of this paragraph, to the extent of the amount which he has paid in excess of his share of the liability.

(g) The individual property of a deceased partner shall be liable for the contributions specified in clause (d) of this paragraph.

(h) When partnership property and the individual properties of the partners are in the possession of a court for distribution, partnership creditors shall have priority on partnership property and separate creditors on individual property, saving the rights of lien or secured creditors as heretofore.

(i) Where a partner has become bankrupt or his estate is insolvent the claims against his separate property shall rank in the following order:

I. Those owing to separate creditors,

II. Those owing to partnership creditors.

III. Those owing to partners by way of contribution.

§ 41. (1) When any new partner is admitted into an exsting partnership, or when any partner retires and assigns (or the representative of the deceased partner assigns) his rights in partnership property to two or more of the partners, or to one or more of the partners and one or more third persons, if the business is continued without liquidation of the partnership affairs, creditors of the first or dissolved partnership are also creditors of the partnership so continuing the business.

(2) When all but one partner retire and assign (or the representative of a deceased partner assigns) their rights in partnership property to the remaining partner, who continues the business without liquidation of partnership affairs, either alone or with others, creditors of

the dissolved partnership are also creditors of the person or partnership so continuing the business.

(3) When any partner retires or dies and the business of the dissolved partnership is continued as set forth in paragraphs (1) and (2) of this section, with the consent of the retired partners or the representative of the deceased partner, but without any assignment of his right in partnership property, rights of creditors of the dissolved partnership and of the creditors of the person or partnership continuing the business shall be as if such assignment had been made.

(4) When all the partners or their representatives assign their rights in partnership property to one or more third persons who promise to pay the debts and who continue the business of the dissolved partnership, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(5) When any partner wrongfully causes a dissolution and the remaining partners continue the business under the provisions of section 38 (2*b*), either alone or with others, and without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(6) When a partner is expelled and the remaining partners continue the business either alone or with others, without liquidation of the partnership affairs, creditors of the dissolved partnership are also creditors of the person or partnership continuing the business.

(7) The liability of a third person becoming a partner in the partnership continuing the business, under this section to the creditors of the dissolved partnership shall be satisfied out of partnership property only.

(8) When the business of a partnership after dissolution is continued under any conditions set forth in this section the creditors of the dissolved partnership, as against the separate creditors of the retiring or deceased partner or the representative of the deceased partner, have a prior right to any claim of the retired partner or the representative of the deceased partner against the person or partnership continuing the business, on account of the retired or deceased partner's interest in the dissolved partnership or on account of any consideration promised for such interest or for his right in partnership property.

(9) Nothing in this section shall be held to modify any right of creditors to set aside any assignment on the ground of fraud.

(10) The use by the person or partnership continuing the business of the partnership name, or the name of a deceased partner as part thereof, shall not of itself make the individual property of the deceasel partner liable for any debts contracted by such person or partnership.

§ 42. When any partner retires or dies, and the business is continued under any of the conditions set forth in section 41 (1, 2, 3, 5, 6,) or section 38 (2*b*), without any settlement of accounts as between him or his estate and the person or partnership continuing the business, unless otherwise agreed, he or his legal representative as against such persons or partnership may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option or at the option of his legal representative, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership: *Provided,* that the creditors of the dissolved partnership as against the separate creditors, or the representative of the retired or deceased partner, shall have priority on any claim arising under this section, as proveded by section 41 (8) of this Act.

§ 43. The right to an account of his interest shall accrue to any partner, or his legal representative, as against the winding up partners or the surviving partners or the person or partnership continuing the business, at the date of dissolution, in the absence of any agreement to the contrary.

Part VII.

MISCELLANEOUS PROVISIONS.

§ 44. All Acts or parts of Acts inconsistent with this Act are hereby repealed.

Filed June 28, 1917.

This bill having remained with the Governor ten days, Sundays excepted, the General Assembly being in session, it has thereby become a law.

Witness my hand this twenty-eighth day of June, A. D. 1917.

Louis L. Emmerson, *Secretary of State.*